Blue to Gold
LAW ENFORCEMENT TRAINING

CASE LAW

Identifying Suspect

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89 S.Ct. 1127
Supreme Court of the United States

Walter B. FOSTER, Petitioner,

v.

CALIFORNIA.

No. 47.
|
Argued Nov. 19, 1968.
|
Decided April 1, 1969.

Synopsis

Prosecution for robbery. After the trial court entered a judgment of conviction the defendant appealed. The California District Court of Appeal affirmed and the California Supreme Court denied review and certiorari was granted. The Supreme Court, Mr. Justice Fortas, held that lineup procedure whereby accused was first placed in lineup with considerably shorter men and after no positive identification was made a one-to-one confrontation was arranged with robbery victim who made only a tentative identification until a subsequent lineup at which victim identified accused, who was the only man who had been in first lineup, was so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process.

Reversed and remanded.

Mr. Justice White, Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice Black dissented.

Attorneys and Law Firms

****1127** ***440** Kenneth L. Maddy, Fresno, Cal., for petitioner.

Doris H. Maier, Sacramento, Cal., for respondent.

Opinion

***441** Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner was charged by information with the armed robbery of a Western Union office in violation of California Penal Code s 211a. The day after the robbery one of the robbers, Clay, surrendered to the police and implicated Foster and Grice. Allegedly, Foster and Clay had entered the office while Grice waited in a car. Foster and Grice were tried together. Grice was acquitted. Foster was convicted. The California District Court of Appeal affirmed the conviction; the State Supreme Court denied review. We granted certiorari, limited to the question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights. 390 U.S. 994, 88 S.Ct. 1201, 20 L.Ed.2d 94 (1968).

****1128** Except for the robbers themselves, the only witness to the crime was Joseph David, the late-night manager of the Western Union office. After Foster had been arrested, David was called to the police station to view a lineup. There were three men in the lineup. One was petitioner. He is a tall man—close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He 'thought' he was the man, but he was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: 'turthfully—I was not sure,' he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had ***442** appeared in the first lineup. This time David was 'convinced' petitioner was the man.

At trial, David testified to his identification of petitioner in the lineups, as summarized above. He also repeated his identification of petitioner in the courtroom. The only other evidence against petitioner which concerned the particular robbery with which he was charged was the testimony of the alleged accomplice Clay.[1]

In United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), this Court held that because of the possibility of unfairness to the accused in the way a lineup is conducted, a lineup is a 'critical stage' in the prosecution, at which the accused must be given the opportunity to be represented by counsel. That holding does not, however, apply to petitioner's case, for the lineups in which he appeared occurred before June 12, 1967. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). But in declaring the rule of Wade and Gilbert to be

applicable only to lineups conducted after those cases were decided, we recognized that, judged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law. 388 U.S., at 302, 87 S.Ct., at 1972 See Simmons v. United States, 390 U.S. 377, 383, 88 S.Ct. 967, 970, 19 L.Ed.2d 1247 (1968); cf. P. Wall, Eye-Witness Identification in Criminal Cases; J. Frank & B. Frank, Not Guilty; 3 J. Wigmore, Evidence s 786a (3d ed. 1940); 4, id., s 1130.

Judged by that standard, this case presents a compelling example of unfair lineup procedures.[2] In the ***443** first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. See United States v. Wade, supra, 388 U.S. at 233, 87 S.Ct. at 1935. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. This Court pointed out in Stovall that '(t)he ****1129** practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.' 388 U.S., at 302, 87 S.Ct., at 1972. Even after this the witness' identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. See Wall, supra, at 64. This finally produced a definite identification.

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact 'the man.' In effect, the police repeatedly said to the witness, 'This is the man.' See Biggers v. Tennessee, 390 U.S. 404, 407, 88 S.Ct. 979, 980, 19 L.Ed.2d 1267 (dissenting opinion). This procedure so undermined the reliability of the eyewitness identification as to violate due process.

In a decision handed down since the Supreme Court of California declined to consider petitioner's case, it reversed a conviction because of the unfair makeup of a lineup. In that case, the California court said: '(W)e do no more than recognize * * * that unfairly constituted lineups have in the past too often brought about the conviction of the innocent.' People v. Caruso, 68 Cal.2d 183, 188, 65 Cal.Rptr. 336, 340, 436 P.2d 336, 340 (1968). In the present case the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable.

***444** The respondent invites us to hold that any error was harmless under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We decline to rule upon this question in the first instance. Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice WHITE, with whom Mr. Justice HARLAN and Mr. Justice STEWART concur, being unwilling in this case to disagree with the jury on the weight of the evidence, would affirm the judgment.

Mr. Justice BLACK, dissenting.

The Court here directs the California courts to set aside petitioner Foster's conviction for armed robbery of the Western Union Telegraph Co. at Fresno, California. The night manager of the telegraph company testified before the court and jury that two men came into the office just after midnight, January 25, 1966, wrote a note telling him it was a holdup, put it under his face, and demanded money, flashed guns, took $531 and fled. The night manager identified Foster in the courtroom as one of the men, and he also related his identification of Foster in a lineup a week or so after the crime. The manager's evidence, which no witness disputed, was corroborated by the testimony of a man named Clay, who was Foster's accomplice in the robbery and who testified for the State. The testimony of these two eyewitnesses was also corroborated by proof that Foster and another person had committed a prior armed robbery of a Western Union office in another city six years before, when they appeared at the company's office, presented a note to an employee announcing their holdup, flashed a gun, and fled with company money. In this case Foster's attorney admitted conviction ***445** for the prior Western Union armed robbery.[1] The circumstances of the two robberies appear to have been practically indistinguishable. Such evidence that a particular person committed a prior crime has been almost universally accepted ****1130** as relevant and admissible to prove that the same person was responsible for a later crime of the same nature.[2] A narration of these facts, falling from the lips of eyewitnesses, and not denied by other eyewitnesses, would be onough, I am convinced, to persuade nearly all lawyers and judges, unhesitatingly to say, 'There was clearly enough evidence of guilt here for a jury to convict the defendant since, according to practice, and indeed

constitutional command, the weight of evidence is for a jury, and not for judges.' Nevertheless the Court in this case looks behind the evidence given by witnesses on the stand and decides that because of the circumstances under which one witness first identified the defendant as the criminal, the United States Constitution requires that the conviction be reversed. The Court, however, fails to spell out exactly what should happen to this defendant if there must be a retrial, and thus avoids the apparently distasteful task of specifying whether (1) at the new trial the jury would again be permitted to hear the eyewitness' testimony and the in-court identification, so long as he does not refer to the previous lineups, or (2) the eyewitness' 'tainted' identification testimony must be entirely excluded, thus compelling Foster's acquittal. Objection to this ambiguity is the first of my reasons for dissent.

***446** I.

The Court declares the judgment of conviction is reversed and the case remanded for further proceedings not inconsistent with this opinion. I am compelled to say that if I were the trial judge in this case I would not know how to proceed or how to decide whether the 'error' in this case was harmless. Of course, when a confession is held to have been compelled, that confession must not be admitted to convict the defendant at all. But the situation in this case is not that simple. For the Court has in effect decided here that the officers of the law have so 'arranged' lineups that the eyewitness to the robbery has been led to make an 'irreparable mistaken identification.' In other words, no one now or hereafter can believe his identification of Foster as the robber. Since he and the accomplice are the only eyewitnesses, and since, in order to convict, California law requires evidence of an accomplice to be corroborated, the Court's direction means, I suppose, that the trial judge here should dismiss the case.[3] The Court's dilemma, which leads to its ambiguous judgment as to the further disposition of this case, points, I think, to the irreparable harm done to the cause of justice by the Court's holding in this case.

II.

Far more fundamental, however, is my objection to the Court's basic holding that evidence can be ruled constitutionally inadmissible whenever it results from identification ***447** procedures that the Court considers to be "unnecessarily suggestive and conducive to irreparable mistaken identification."[4] One of the proudest achievements of this country's ****1131** Founders was that they had eternally guaranteed a trial by jury in criminal cases, at least until the Constitution they wrote had been amended in the manner they prescribed. Only last year in Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), this Court emphatically decided, over strong dissents, that this constitutional right to trial by jury in criminal cases is applicable to the States. Of course it is an incontestable fact in our judicial history that the jury is the sole tribunal to weigh and determine facts. That means that the jury must, if we keep faith with the Constitution, be allowed to hear eyewitnesses and decide for itself whether it can recognize the truth and whether they are telling the truth. It means that the jury must be allowed to decide for itself whether the darkness of the night, the weakness of a witness' eyesight, or any other factor impaired the witness' ability to make an accurate identification. To take that power away from the jury is to rob it of the responsibility to perform the precise functions the Founders most wanted it to perform. And certainly a Constitution written to preserve this indispensable, unerodible core of our system for trying criminal cases would not have included, hidden among its provisions, a slumbering sleeper granting the judges license to destroy trial by jury in whole or in part.

This brings me to the constitutional theory relied upon by the Court to justify its invading the constitutional right of jury trial. The Court here holds that:
'(j)udged by the 'totality of the circumstances,' the conduct of identification procedures may be 'so ***448** unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law. * * *

'Judged by that standard, this case presents a compelling example of unfair lineup procedures.' Ante, at 1128.

I do not deny that the 'totality of circumstances' can be considered to determine whether some specific constitutional prohibitions have been violated, such, for example, as the Fifth Amendment's command against compelling a witness to incriminate himself. Whether evidence has been compelled is, of course, a triable issue of fact. And the constitutional command not to compel a person to be a witness against himself, like other issues of fact, must be determined by a resolution of all facts and the 'totality' of them offered in evidence. Consequently were the Court's legal formula posed for application in a coerced testimony case, I could agree

to it. But it is not. Instead the Court looks to the 'totality of circumstances' to show 'unfair lineup procedures.' This means 'unfair' according to the Court's view of what is unfair. The Constitution, however, does not anywhere prohibit conduct deemed unfair by the courts. As we recently said in United States v. Augenblick, 393 U.S. 348, 352, 89 S.Ct. 528, 532, 21 L.Ed.2d 537 (1969): 'Rules of evidence are designed in the interests of fair trials. But unfairness in result is no sure measure of unconstitutionality.'

The Constitution sets up its own standards of unfairness in criminal trials in the Fourth, Fifth, and Sixth Amendments, among other provisions of the Constitution. Many of these provisions relate to evidence and its use in criminal cases. The Constitution provides that the accused shall have the right to compulsory process for obtaining witnesses in his favor. It ordains that evidence shall not be obtained by compulsion of the accused. It ordains that the accused shall have the right to confront ***449** the witnesses against him. In these ways the Constitution itself dictates what evidence is to be excluded because it was improperly obtained or because it is not sufficiently reliable. But the Constitution does not give this Court any general authority to require exclusion of all evidence that this Court considers improperly ****1132** obtained or that this Court considers insufficiently reliable. Hearsay evidence, for example, is in most instances rendered inadmissible by the Confrontation Clause, which reflects a judgment, made by the Framers of the Bill of Rights, that such evidence may be unreliable and cannot be put in proper perspective by cross-examination of the person repeating it in court. Nothing in this constitutional plan suggests that the Framers drew up the Bill of Rights merely in order to mention a few types of evidence 'for illustration,' while leaving this Court with full power to hold unconstitutional the use of any other evidence that the Justices of this Court might decide was not sufficiently reliable or was not sufficiently subject to exposure by cross-examination. On the contrary, as we have repeatedly held, the Constitution leaves to the States and to the people all these questions concerning the various advantages and disadvantages of admitting certain types of evidence. Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948).

It has become fashionable to talk of the Court's power to hold governmental laws and practices unconstitutional whenever this Court believes them to be 'unfair,' contrary to basic standards of decency, implicit in ordered liberty, or offensive to 'those canons of decency and fairness which express the notions of justice of English-speaking peoples * *.'[5] All of these different general ***450** and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts. When I consider the incontrovertible fact that our Constitution was written to limit and define the powers of the Federal Government as distinguished from the powers of States, and to divide those powers granted the United States among the separate Executive, Legislative, and Judicial branches, I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

I realize that some argue that there is little difference between the two constitutional views expressed below:
One. No law should be held unconstitutional unless its invalidation can be firmly planted on a specific constitutional provision plus the Necessary and Proper Clause.

Two. All laws are unconstitutional that are unfair, shock the conscience of the Court, offend its sense of decency, or violate concepts implicit in ordered liberty.

The first of these two constitutional standards plainly tells judges they have no power to hold laws unconstitutional unless such laws are believed to violate the written Constitution. The second constitutional standard, based on the words 'due process,' not only does not require judges to follow the Constitution as written, but actually encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice. This formula imposes no 'restraint' on judges beyond requiring them to follow their own best judgment as to what is wise, just, and best under the circumstances of a particular case. This case well illustrates the extremes ***451** to which the formula can take men who are both wise and good. Although due process requires that courts summon witnesses so that juries can determine the ****1133** guilt or innocence of defendants, the Court, because of its sense of fairness, decides that due process deprives juries of a chance to hear witnesses who the Court holds could not or might not tell the truth.

I began my opposition to this fallacious concept of 'due process' even before I became a member of this Court[6] and expressed it formally soon after my service on the Court began.[7] And it was not long before I emphasized that quite a

different belief about the meaning of the phrase 'due process' had long existed in our judicial history in opposition to the 'decency and fairness' doctrine. See Chambers v. Florida, 309 U.S. 227, 235—236, n. 8, 60 S.Ct. 472, 476—477, 84 L.Ed. 716 (1940).

My experience on the Court has confirmed my early belief that the 'decency and fairness' due process test cannot stand consistently with our written Constitution.

III.

I agree with the Court that we should not undertake to pass on the question of harmless error for the first time in this Court. Under the Court's holding, the case should be remanded to the state courts for decision of this question.

In recent years this Court has, in a series of cases, held that most of the Bill of Rights is now applicable against the States as well as against the Federal Government. This has brought about a tremendous increase in the number of state criminal cases involving federal questions, some of which depend on the particular facts and circumstances of the case. In Fifth Amendment ***452** confession cases, for example, courts must under prevailing practice hear evidence to determine whether confessions were compelled. This Court was power in cases of that kind to review evidence before the trial courts. No one can now predict with accuracy how great a number of such cases are destined to come before us, but all know it will be many. Should we not make it an almost invariable practice to accept lower court findings of fact on such issues, our Supreme Court is likely to find itself proccupied with the business of a state court of criminal appeals, a condition not devoutly to be wished in the Court's interest or in the interest of the administration of justice in general. This problem is magnified many times over when account is taken of the harmless-error rules that many States have now adopted, since these rules also raise factual issues involving a federal question whenever the error itself is federal. See Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). If trial errors are found some courts along the line must determine whether the error was harmless. That question has, because of this Court's judgment, now arisen in this case. I agree with the Court that we should not decide this question here. In the present posture of criminal law, there are simply too many federal questions in the state cases before us to defend a pracice of our deciding in the first instance that there was no harmless error. There are many reasons for this other than the necessity of saving our time for the vastly more important issues we must decide. To say the least, the question whether an error in a particular case is harmless is an issue peculiarly for lower, not for the highest, appellate courts. Then, too, this issue can usually be tried more efficiently, and just as fairly, by the local court that tried the case or by the local appellate court that heard the first appeal. This Court was not established to try such minor issues of fact for the first time. Of course, I do not mean ****1134** to suggest that ***453** there should be an ironclad rule always barring the Court from deciding an issue in cases if it plainly and manifestly appears that it would be egregiously unjust and undoubtedly wrong to leave an issue undecided. But I do not think this even distantly approaches being such a case. Even though I steadfastly believe the Court's basic holding is error, I do agree that we should not establish a precedent of passing on harmless error for the first time in this Court before the courts below have had an opportunity to consider the question.

For the above reasons I dissent from the reversal and remand of this case.

All Citations

394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402

Footnotes

1 California law requires that an accomplice's testimony be corroborated. California Penal Code s 1111. These was also evidence that Foster had been convicted for a similar robbery committed six years before.

2 The reliability of properly admitted eyewitness identification, like the credibility of the other parts of the prosecution's case is a matter for the jury. But it is the teaching of Wade, Gilbert, and Stovall, supra, that in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law.

1 Counsel also admitted a prior felony conviction of assault with intent to commit rape, a circumstance relevant in California in connection with punishment.

2 See Spencer v. Texas, 385 U.S. 554, 560—561 and n. 7, 87 S.Ct. 648, 651—652, 17 L.Ed.2d 606 (1967); State v. Chance, 92 Ariz. 351, 377 P.2d 197 (1962); Nester v. State, 75 Nev. 41, 334 P.2d 524 (1959); Mosley v. State, 211 Ga. 611, 87 S.E.2d 314 (1955); 2 J. Wigmore, Evidence s 416 (3d ed. 1940 and 1964 Supp.).

3 The Court apparently means that the only other evidence against Foster in this case—his prior conviction for involvement in a crime of a similar type—is constitutionally admissible. See Spencer v. Texas, supra. But it may by doubtful whether this past conviction, although highly relevant to the question of guilt, could constitute corroboration of the accomplice's testimony, within the meaning of the California requirement.

4 Ante, at 1128, quoting from Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967).

5 Malinski v. New York, 324 U.S. 401, 417, 65 S.Ct. 781, 788—789, 89 L.Ed. 1029 (opinion of Frankfurter, J.) (1945); see also Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952); Irvine v. California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 (1954).

6 See, e.g., 81 Cong.Rec.App., pt. 9, pp. 638—639; id., at 307.

7 See, e.g., McCart v. Indianapolis Water Co., 302 U.S. 419, 423, 58 S.Ct. 324, 325, 82 L.Ed. 336 (1938) (dissenting opinion).

87 S.Ct. 1951
Supreme Court of the United States

Jesse James GILBERT, Petitioner,

v.

STATE OF CALIFORNIA.

No. 223.
|
Argued Feb. 15 and 16, 1967.
|
Decided June 12, 1967.

Synopsis

Prosecution for armed robbery and murder. The Superior Court, Los Angeles County, rendered judgment, and defendant appealed. The California Supreme Court, 63 Cal.2d 690, 47 Cal.Rptr. 909, 408 P.2d 365, affirmed in part and reversed in part, and defendant obtained certiorari. The Supreme Court, Mr. Justice Brennan, held that the taking of a handwriting exemplar in absence of counsel did not deny Fifth or Sixth Amendment rights, but that admission of in-court identifications without determination that they were not tainted by illegal lineup was constitutional error, and that testimony that witnesses had identified defendant at illegal lineup was per se inadmissible.

Judgment and conviction vacated and case remanded.

Mr. Justice Black, Mr. Justice White, Mr. Justice Fortas, Mr. Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

Attorneys and Law Firms

****1952** ***264** Luke McKissack, Los Angeles, Cal., for petitioner.

Norman H. Sokolow and William E. James, Los Angeles, Cal., for respondent.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

This case was argued with United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149, and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges constitutional ***265** errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup, in the admission of handwriting exemplars taken from him after his arrest, and in the admission of out-of-court statements by King, a co-defendant, mentioning petitioner's part in the crimes, which statements, on the co-defendant's appeal decided with petitioner's, were held to have been improperly admitted against the codefendant. Finally, he alleges that his Fourth Amendment rights were violated by a police seizure of photographs of him from his locked apartment after entry without a search warrant, and the admission of testimony of witnesses that they identified him from those photographs within hours after the crime.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme Court affirmed, 63 Cal.2d 690, 47 Cal.Rptr. 909, 408 P.2d 365. We granted certiorari, 384 U.S. 985, 86 S.Ct. 1902, 16 L.Ed.2d 1003, and set the case for argument with Wade and with ****1953** Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199. If our holding today in Wade is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I.

THE HANDWRITING EXEMPLARS.

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra ***266** robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner

had waived any rights that he might have had not to furnish them. '(The agent) did not tell Gilbert that the exemplars would not be used in any other investigation. Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief.' 63 Cal.2d, at 708, 47 Cal.Rptr., at 920, 408 P.2d, at 376. The court did not, therefore, decide petitioner's constitutional claims.

We pass the question of waiver since we conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination. The privilege reaches only compulsion of 'an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers,' and not 'compulsion which makes a suspect or accused the source of 'real or physical evidence' * * *.' Schmerber v. State of California, 384 U.S. 757, 763—764, 86 S.Ct. 1826, 1833, 16 L.Ed.2d 908. One's voice and handwriting are, of course, means of communication. It by no means follows, however, that every compulsion of an accused to use his voice or write compels a communication within the cover of the privilege. A mere handwriting exemplar, in contrast to the content of what is ***267** written, like the voice or body itself, is an identifying physical characteristic outside its protection. United States v. Wade, supra, 388 U.S., at 222—223, 87 S.Ct., at 1929—1930. No claim is made that the content of the exemplars was testimonial or communicative matter. Cf. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

Second. The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. United States v. Wade, supra. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, 'the accused has the opportunity for a meaningful confrontation of the (State's) case at trial through the ordinary processes of cross-examination of the (State's) expert (handwriting) ****1954** witnesses and the presentation of the evidence of his own (handwriting) experts.' United States v. Wade, supra, 388 U.S., at 227—228, 87 S.Ct., at 1932—1933.

II.

ADMISSION OF CO-DEFENDANT'S STATEMENTS.

Petitioner contends that he was denied due process of law by the admission during the guilt stage of the trial of his accomplice's pretrial statements to the police which referred to petitioner 159 times in the course of reciting petitioner's role in the robbery and murder. The statements were inadmissible hearsay as to petitioner, and were held on King's aspect of this appeal to be improperly obtained from him and therefore to be inadmissible against him under California law. 63 Cal.2d, at 699—701, 47 Cal.Rptr., at 914—915, 408 P.2d, at 370—371.

***268** Petitioner would have us reconsider Delli Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (where the Court held that appropriate instructions to the jury would suffice to prevent prejudice to a defendant from the references to him in a co-defendant's statement), at least as applied to a case, as here, where the co-defendant gained a reversal because of the improper admission of the statements. We have no occasion to pass upon this contention. The California Supreme Court has rejected the Delli Paoli rationale, and relying at least in part on the reasoning of the Delli Paoli dissent, regards cautionary instructions as inadequate to cure prejudice. People v. Aranda, 63 Cal.2d 518, 47 Cal.Rptr. 353, 407 P.2d 265. The California court applied Aranda in this case but held that any error as to Gilbert in the admission of King's statements was harmless. The harmless-error standard applied was that, 'there is no reasonable possibility that the error in admitting King's statements and testimony might have contributed to Gilbert's conviction,' a standard derived by the court from our becision in Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171.[1] Fahy was the basis of our holding in Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, and the standard applied by the California court satisfies the standard as defined in Chapman.

It may be that the California Supreme Court will review the application of its harmless-error standard to King's statements if on the remand the State presses harmless error also in the introduction of the in-court and lineup identifications.

However, this at best implies an ultimate application of Aranda and only confirms that petitioner's argument for reconsideration of Delli Paoli need not be considered at this time.

***269** III.

THE SEARCH-AND-SEIZURE CLAIM.

The California Supreme Court rejected Gilbert's challenge to the admission of certain photographs taken from his apartment pursuant to a warrantless search. The court justified the entry into the apartment under the circumstances on the basis of so-called 'hot pursuit' and 'exigent circumstances' exceptions to the warrant requirement. We granted certiorari to consider the important question of the extent to which such exceptions may permit warrantless searches without violation of the Fourth Amendment. A closer examination of the record than was possible when certiorari was granted reveals that the facts do not appear with sufficient clarity to enable us to decide that question. ****1955** See Appendix to this opinion; compare Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782. We therefore vacate certiorari on this issue as improvidently granted. The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184, 79 S.Ct. 710, 713, 3 L.Ed.2d 723.

IV.

THE IN-COURT AND LINEUP IDENTIFICATIONS.

Since none of the petitioner's other contentions warrants relief, the issue becomes what relief is required by application to this case of the principles today announced in United States v. Wade, supra.

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, identified Gilbert in the courtroom and also testified, in substance, to her prior lineup identification on examination by the ***270** State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The line-up was on a stage behind-bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.[2]

***271** At the guilt stage, after the first witness, a cashier of the savings and loan association, identified Gilbert in the courtroom, ****1956** defense counsel moved, out of the presence of the jury, to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment made applicable to the States by the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, 'predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup. * * *' The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

***272** The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. United States v. Wade, supra. We there held that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup. However, as in Wade, the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled

only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the incourt identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup.[3] That testimony is the direct **1957 result of the illegal *273 lineup 'come at by exploitation of (the primary) illegality.' Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441. The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a per se exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. Cf. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081. That conclusion is buttressed by the consideration that the witness' testimony of his lineup identification will enhance the impact of his in-court identification on the jury and *274 seriously aggravate whatever derogation exists of the accused's right to a fair trial. Therefore, unless the California Supreme Court is 'able to declare a belief that it was harmless beyond a reasonable doubt,' Chapman v. State of California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

The judgment of the California Supreme Court and the conviction are vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion. It is so ordered.

Judgment and conviction vacated and case remanded with directions.

THE CHIEF JUSTICE joins this opinion except for Part III, from which he dissents for the reasons expressed in the opinion of Mr. Justice DOUGLAS.

APPENDIX TO OPINION OF THE COURT

Photographs of Gilbert introduced at the guilt stage of the trial had been viewed by eyewitnesses within hours after the robbery and murder. Officers had entered his apartment without a warrant and found them in an envelope on the top of a bedroom dresser. The envelope was of the kind customarily used in delivering developed prints, with the words 'Marlboro Photo Studio' imprinted on it. The officers entered the apartment because of information given by an accomplice which led them to believe that one of the suspects might be inside the apartment. Assuming that the warrantless entry into the apartment was justified by the need immediately to search for the suspect, the issue remains whether the subsequent search was reasonably supported by those same exigent circumstances. If the envelope *275 were come upon in the course of a search for the suspect, the answer might be different from that where it is come upon, even though in plain view, in the course of a general, indiscriminate search of closets, dressers, etc., after it is known that the occupant is absent. Still different considerations may be presented where officers, pursuing the suspect, find he is absent from **1958 the apartment but conduct a limited search for suspicious objects in plain view which might aid in the pursuit. The problem with the record in the present case is that it could reasonably support any of these factual conclusions upon which our constitutional analysis should rest, and the trial court made no findings on the scope of search. The California Supreme Court, which had no more substantial basis upon which to resolve the conflict than this Court, stated that the photos were come upon 'while the officers were looking through the apartment for their suspect. * * *' As will appear, a contrary conclusion is equally reasonable.

(1) Agent schlatter testified that immediately upon entering the apartment which he put at 'approximately 1:05,' the officers made a quick search for the occupant, which took at most a minute, and that the continued presence of the officers became 'a matter of a stake-out under the assumption that the person or persons involved would come back.' He testified that the officer who found the photographs, Agent Crowley, had entered the apartment with him. Agent Schlatter's testimony might support the California Supreme Court's view of the scope of search; (2) Agent Crowley testified that he arrived within five minutes after Agent Schlatter, 'around 1:30, give or take a few minutes either way,' that the apartment had already been searched for the

suspects, and that he was instructed 'to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person ***276** without conducting a detailed search.' Crowley's further testimony was that the search pursuant to which the photos were found, was limited in this manner, and that he merely inspected objects in plain sight which would aid in identification. He stated that a detailed search for guns and money was not conducted until after a warrant had issued over three hours later. (3) Agent Townsend said he arrived at the apartment 'sometime between perhaps 1:30 and 2:00,' and that 'well within an hour' he, Agent Crowley, another agent and a local officer conducted a detailed search of the bedroom. He stated that they 'looked through the bedroom closet and dresser and I think * * * the headstand.' A substantial sum of money was found in the dresser. Townsend could not 'specifically say' whether Crowley was in the bedroom at the time the money was found. This testimony might support a finding that the officers were engaged in a general search of the bedroom at the time the photos were found.

The testimony of the agents concerning their time of arrival in the partment is not inconsistent with any of the three possible conclusions as to the scope of search. Taking Townsend's testimony together with Crowley's, it can be concluded that the two arrived at about the same time. Agent Schlatter's testimony that Crowley arrived with him at 1:05, however, supports a conclusion that Crowley had begun his activities before Townsend arrived. Then there is the testimony of Agent Kiel, who did not enter the apartment, that he obtained the photos while talking with the landlady 'approximately 1:25 to 1:30,' about the same time that both Crowley and Townsend testified they arrived. In sum, the testimony concerning the timing of the events surrounding that search is both approximate and itself contradictory.

***281** Mr. Justice DOUGLAS, concurring in part and dissenting in part.

While I agree with the Court's opinion except for Part I,[**] (as respects which I agree with Mr. Justice BLACK and Mr. Justice FORTAS), I would reverse and remand for a new trial on ***282** the search and seizure point. The search of the petitioner's home is sought to be justified by the doctrine of 'hot pursuit,' even though the officers conducting the search knew that petitioner, the suspected criminal, was not at home.

****1959** At about 10:30 a.m. on January 3, 1964, a California bank was robbed by two armed men; a police officer was killed by one of the robbers. Another officer shot one of the robbers, Weaver, who was captured a few blocks from the scene of the crime. Weaver told the police that he had participated in the robbery and that a person known to him as 'Skinny' Gilbert was his accomplice. He told the officers that Gilbert lived in Apartment 28 of 'a Hawaiian sounding named apartment house' on Los Feliz Boulevard. This information was given to the Federal Bureau of Investigation and was broadcast to a field agent, Kiel, who was instructed to find the apartment. Kiel located the 'Lanai,' an apartment on Los Feliz Boulevard, at about 1 p.m., informed the radio control, and engaged the apartment manager in conversation. While they were talking, a man gave a key to the manager and told her that he was going to San Francisco for a new days. Agent Kiel learned from the manager that Flood, one of the two men who had rented Apartment 28 the previous day, was the man who had just turned in the key and left by the rear exit. The agent ran out into the alleyway but saw no one.

In the meantime, the federal officers learned from Weaver that Gilbert was registered under the name of Flood. They also learned that three men may have been involved in the robbery—the two who entered the bank and a third driving the getaway car. About 1:10 p.m., additional federal agents arrived at the apartment, in response to Agent Kiel's radio summons. Kiel told them that the resident of Apartment 28 was a Robert Flood who had just left. The agents obtained a key from the ***283** manager, entered the apartment and searched for a person or a hiding place for a person. They found no one. But they did find an envelope containing pictures of petitioner; the pictures were seized and shown to bank employees for identification. The agents also found a notebook containing a diagram of the area surrounding the bank, a clip from an automatic pistol, and a bag containing rolls of coins bearing the marking of the robbed bank. On the basis of this information, a search warrant was issued, and the automatic clip, notebook, and coin rolls were seized. Petitioner was arrested in Pennsylvania on February 26. The items seized during the search of his apartment were introduced in evidence at his trial for murder.

The California Supreme Court justified the search on the ground that the police were in not pursuit of the suspected bank robbers. The entry of the apartment was lawful. The subsequent search and seizure was lawful since the officers were trying to further identify suspects and to facilitate continued pursuit. 63 Cal.2d 690, 47 Cal.Rptr. 909, 408 P.2d 365.

I have set forth the testimony relating to the search more fully in the Appendix to this opinion. For the reasons stated there, I cannot agree that 'the facts do not appear with sufficient clarity to enable us to decide' the serious question presented.

Since the search and seizure took place without a warrant, it can stand only if it comes within one of the narrowly defined exceptions to the rule that a search and seizure must rest upon a validly executed search warrant. See, e.g. United States v. Jeffers, 342 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59; Jones v. United States, 357 U.S. 493, 78 S.Ct. 1253, 2 L.Ed.2d 1514; Rios v. United States, 364 U.S. 253 261, 80 S.Ct. 1431, 1436, 4 L.Ed.2d 1688; Stoner v. State of California, 376 U.S. 483, 486, 84 S.Ct. 889, 891, 11 L.Ed.2d 856. One of these exceptions is that officers having probable cause to arrest may enter a dwelling to make the arrest and conduct a contemporaneous ***284** search of the place of arrest 'in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody.' ****1960** Agnello v. United States, 269 U.S. 20, 30, 46 S.Ct. 4, 5, 70 L.Ed. 145. This, of course, assumes that an arrest has been made, and that the search 'is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.' Stoner v. State of California, supra, 376 U.S. at 486, 84 S.Ct. at 891. In this case, the exemption is not applicable since the arrest was made many days after the search and at a location far removed from the search.

Here, the officers entered the apartment, searched for petitioner and did not find him. Nevertheless, they continued searching the apartment and seized the pictures; the inescapable conclusion is that they were searching for evidence linking petitioner to the bank robbery, not for the suspected robbers. The court below said that, having legally entered the apartment, the officer 'could properly look through the apartment for anything that could be used to identify the suspects or expedite the pursuit.' 63 Cal.2d, at 707, 47 Cal.Rptr., at 919, 408 P.2d, at 375.

Prior to this case, police could enter and search a house without a warrant only incidental to a valid arrest. If this judgment stands, the police can search a house for evidence, even though the suspect is not arrested. The purpose of the search is, in the words of the California Supreme Court, 'limited to and incident to the purpose of the officers' entry'—that is, to apprehend the suspected criminal. Under that doctrine, the police are given license to search for any evidence linking the homeowner with the crime. Certainly such evidence is well calculated 'to identify the suspects,' and will 'expedite the pursuit' since the police can then concentrate on the person whose home has been ransacked. Ibid.

***285** The search and seizure in this case violates another limitation, which concededly the ill-starred decision in Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399, flouted, viz., that a general search for evidence, even when the police are in 'hot pursuit' or have a warrant of arrest, does not make constitutional a general search of a room or of a house (United States v. Lefkowitz, 285 U.S. 452, 463—464, 52 S.Ct. 420, 422—423, 76 L.Ed. 877). If it did, then the police, acting without a search warrant, could search more extensively than when they a have warrant. For the warrant must, as prescribed by the Fourth Amendment, 'particularly' describe the 'things to be seized.' As stated by the Court in United States v. Lefkowitz, supra, at 464, 52 S.Ct., at 423:
'The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.'

Indeed, if at the very start, there had been a search warrant authorizing the seizure of the automatic clip, notebook, and coin rolls, the envelope containing pictures of petitioner could not have been seized. 'The requirement that warrants shall particularly describe the things ***286** to be seized * * * prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' ****1961** Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231.

The modern police technique of ransacking houses, even to the point of seizing their entire contents as was done in Kremen v. United States, 353 U.S. 346, 77 S.Ct. 828, 1 L.Ed.2d 876, is a shocking departure from the philosophy of

the Fourth Amendment. For the kind of search conducted here was indeed a general search. And if the Fourth Amendment was aimed at any particular target it was aimed at that. When we take that step, we resurrect one of the deepest-rooted complaints that gave rise to our Revolution. As the Court stated in Boyd v. United States, 116 U.S. 616, 625, 6 S.Ct. 524, 529, 29 L.Ed. 746:

'The practice had obtained in the colonies of issuing writs of assistance to the revenue officers empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental prnciples of law, that ever was found in an English and the fundamental principles of law, liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.''

I would not allow the general search to reappear on the American scene.

***287** APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

As the Court notes, there is some confusion in the record respecting the timing of events surrounding the search and the breadth of purpose with which the search was conducted. The confusion results from the testimony of the agents involved.

Agent Kiel testified that Agents Schlatter and Onsgaard arrived at the apartment at about 1:10 and entered the apartment in a minute or two after their arrival. Kiel received the photographs from Agent Schlatter between 1:25 and 1:30.

Agent Schlatter testified that he, Agent Onsgaard and some local police arrived at the apartment about 1:05 and that Agent Crowley and one or two local police officers arrived in another car at the same time. Schlatter briefly talked to Kiel and the apartment manager and then entered the apartment. Upon entering he saw no one. He 'made a very fast search of the apartment for (a) person or a hiding place of a person and * * * found none.' This search took 'a matter of seconds or a minute at the outside' and '(a)fter we had searched for a person or persons, and no one was there, it then became a matter of a stakeout under the assumption that the person or persons involved would come back.' It seemed to Schlatter that 'an agent had (the photograph) in his hand,' when he first saw it, that it 'was in the hands of an agent or an officer,' and Schlatter had 'a vague recollection that (the agent or officer told him he had found it) in the bedroom * * *.' There were a number of photographs. Schlatter took the photographs out to Kiel and instructed him to take one of them to the savings and loan association and see if anyone there could recognize the photograph. Schlatter testified that he was in the apartment for about 30 minutes after making the search and left other agents behind when he left.

***288** Agent Crowley testified that he entered the apartment 'around 1:30, give or take a few minutes either way' and that he would say that the other officers had been in the apartment less than five minutes before he entered. He believed ****1962** that 'the officers and the other agent who had been with (him) at the rear of the building when the first entry was made, entered with (him).' When Crowley entered the apartment it 'had already been searched for people.' He received 'instructions * * * to look through the apartment for anything we could find that we could use to identify or continue the pursuit of this person without conducting a detailed search.' In the bedroom, on the dresser, Crowley saw an envelope bearing the name 'Marlboro Photo Studio'; it appeared to him to be an envelope containing photos and he could see that there was something inside. Crowley opened the envelope and saw several copies of photographs. He discussed the matter with 'Onsgaard who was in charge in the building and he instructed (Crowley) to give it to another agent for him to utilize in pursuing the investigation, and (he was) reasonably certain that that agent was Mr. Schlatter.' This was about 1:30 according to Crowley. In the course of his search which turned up the photographs, Crowley 'turned over (items) to see what was on the reverse, such as business cards, sales slips from local stores, that sort of item which might have been folded and would appear to possibly contain information of value to pursuit.' He relayed the information obtained in this manner to the man coordinating the operation. Crowley remained in the apartment until the next morning.

Agent Townsend testified that he arrived at the apartment '(s)ometime between perhaps 1:30 and 2:00.' Within an hour of his arrival, he began a search. Townsend testified that he, Agent Crowley, another agent and a local officer 'looked through the bedroom closet and ***289** the dresser and I think the headstand.' This was after it was known that no one, other than agents and police officers, was in the apartment.

Townsend stated that the agents and officers were '(i)n and out of the bedroom,' that he found money in the bedroom dresser about an hour after he arrived in the apartment, and that he could not 'say specifically' whether Crowley was there at that time.

Thus, there is some conflict regarding the times at which the events took place and with respect to the nature of the searches conducted by the various officers. The way I read the record, however, it is not in such a state 'that the facts do not appear with sufficient clarity to enable us to decide' the question presented. Crowley's testimony that he came upon the photographs while searching 'for anything * * * that we could use to identify or continue the pursuit' stands uncontradicted, as does his testimony that the apartment had already been searched for a person prior to his search uncovering the photographs. Schlatter's testimony that the operation 'became a matter of a stake-out' after the unsuccessful search for a person does not contradict Crowley's testimony. A search for identifying evidence is certainly compatible with a 'stake-out.' And Crowley best knew what he was doing when he discovered the photographs. Nor does Townsend's testimony that he and others, perhaps including Crowley, conducted a detailed search conflict with Crowley's testimony. First, the record indicates that the detailed search was conducted after the photographs had been found. According to the testimony of Kiel and Schlatter, Schlatter gave the photographs to Kiel at about 1:30; according to Townsend, he arrived sometime between 1:30 and 2. Second, even if the detailed search took place before Crowley found the photographs and Crowley participated in that search, that does not indicate that Crowley's search which turned ***290** up the photographs was more limited than Crowley claimed. If anything, it would indicate that his search was more general than he stated. Finally, Townsend's testimony as to the general search does not conflict with Schlatter's testimony that the operation became a 'stake-out' after the suspect ****1963** was not found. As I have said, a 'stake-out' does not preclude a detailed search for evidence. And, the record indicates that Schlatter was not in the apartment when Townsend and the others conducted the detailed search.

The way I read the record, the photographs were discovered in the course of a general search for evidence. But even if Crowley is not believed and his testimony relating to the nature of his search is thrown out and it is simply assumed that he came upon the envelope in the course of a search for the suspect, there was no reason to pry into the envelope and seize the pictures—other than to obtain evidence. An envelope would contain neither the suspect nor the weapon.

***277** Mr. Justice BLACK, concurring in part and dissenting in part.

Petitioner was convicted of robbery and murder partially on the basis of handwriting samples he had given to the police while he was in custody without counsel and partially on evidence that he had been identified by eyewitnesses at a lineup identification ceremony held by California officers in a Los Angeles auditorium without notice to his counsel. The Court's opinion shows that the officers took Gilbert to the auditorium while he was a prisoner, formed a lineup of Gilbert and other persons, required each one to step forward, asked them certain questions, and required them to repeat certain phrases, while eyewitnesses to this and other crimes looked at them in efforts to identify them as the criminals. At his trial, Gilbert objected to the handwriting samples and to the identification testimony given by witnesses who saw him at the auditorium lineup on the ground that the admission of this evidence would violate his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel. It is well-established now that the Fourteenth Amendment makes both the Self-Incrimination Clause of the Fifth Amendment and the Right to Counsel Clause of the Sixth Amendment obligatory on the States. See, e.g., Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799.

I.

(a) Relying on Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908, the Court rejects Gilbert's Fifth Amendment contention as to both the handwriting exemplars and the lineup identification. I dissent from that holding. For reasons set out in my separate opinion in United States v. Wade, 388 U.S., p. 243, 87 S.Ct., p. 1941, as well as in my dissent to Schmerber, 384 U.S., at 773, 86 S.Ct., at 1837, I think that case wholly unjustifiably detracts from the protection against compelled self-incrimination ***278** the Fifth Amendment was designed to afford. It rests on the ground that compelling a suspect to submit to or engage in conduct the sole purpose of which is to supply evidence against himself nonetheless does not compel him to be a witness against himself. Compelling a suspect or an accused to be 'the source of 'real or physical evidence' * * * ,' so says Schmerber, 384 U.S., at 764, 86 S.Ct., at 1832, is not compelling him to be a witness against himself. Such an artificial distinction between things that are in reality the

same is in my judgment wholly out of line with the liberal construction which should always be given to the Bill of Rights. See Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

(b) The Court rejects Gilbert's right-to-counsel contention in connection with the handwriting exemplars on the ground that the taking of the exemplars 'was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel.' In all reality, however, it was one of the most 'critical' stages of the government proceedings that ended in Gilbert's conviction. As to both the State's case and Gilbert's defense, the handwriting exemplars were just as important as the lineup and perhaps more **1964 so, for handwriting analysis, being, as the Court notes, 'scientific' and 'systematized,' United States v. Wade, 388 U.S., at 227, 87 S.Ct., at 1932, may carry much more weight with the jury than any kind of lineup identification. The Court, however, suggests that absence of counsel when handwriting exemplars are obtained will not impair the right of cross-examination at trial. But just as nothing said in our previous opinions 'links the right to counsel only to protection of Fifth Amendment rights,' United States v. Wade, ante, 388 U.S., at 226, 87 S.Ct., at 1932, nothing has been said which justifies linking the right to counsel only to the protection of other Sixth Amendment rights. And there is nothing in the Constitution to justify considering the right to counsel as a second- *279 class, subsidiary right which attaches only when the Court deems other specific rights in jeopardy. The real basis for the Court's holding that the stage of obtaining hadwriting exemplars is not 'critical,' is its statement that 'there is minimal risk that the absence of counsel might derogate from his right to a fair trial.' The Court considers the 'right to a fair trial' to be the overriding 'aim of the right to counsel,' United States v. Wade, at 226, 87 S.Ct., at 1932, and somehow believes that this Court has the power to balance away the constitutional guarantee of right to counsel when the Court believes it unnecessary to provide what the Court considers a 'fair trial.' But I think this Court lacks constitutional power thus to balance away a defendant's absolute right to counsel which the Sixth and Fourteenth Amendments guarantee him. The Framers did not declare in the Sixth Amendment that a defendant is entitled to a 'fair trial,' nor that he is entitled to counsel on the condition that this Court thinks there is more than a 'minimal risk' that without a lawyer his trial will be 'unfair.' The Sixth Amendment settled that a trial without a lawyer is constitutionally unfair, unless the courtcreated balancing formula has somehow changed it. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, I thought finally established the right of an accused to counsel without balancing of any kind.

The Court's holding here illustrates the danger to Bill of Rights guarantees in the use of words like a 'fair trial' to take the place of the clearly specified safeguards of the Constitution. I think it far safer for constitutional rights for this Court to adhere to constitutional language like 'the accused shall * * * have the Assistance of Counsel for his defence' instead of substituting the words not mentioned, 'the accused shall have the assistance of counsel only if the Supreme Court thinks it necessary to assure a fair trial.' In my judgment the guarantees *280 of the Constitution with its Bill of Rights provide the kind of 'fair trial' the Framers sought to protect. Gilbert was entitled to have the 'assistance of counsel' when he was forced to supply evidence for the Government to use against him at his trial. I would reverse the case for this reason also.

II.

I agree with the Court that Gilbert's case should not be reversed for state error in admitting the pretrial statements of an accomplice which referred to Gilbert. But instead of squarely rejecting petitioner's reliance on the dissent in Delli Paoli v. United States, 352 U.S. 232, 246, 77 S.Ct. 294, 1 L.Ed.2d 278, the Court avoids the issue by pointing to the fact that the California Supreme Court, even assuming the error to be a federal constitutional one, applied a harmless-error test which measures up to the one we subsequently enunciated in Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705. And the Court then goes on to suggest that the California Supreme Court may desire to reconsider whether that is so upon remand.

**1965 I think the Court should clearly indicate that neither Delli Paoli nor Chapman has any relevance here. Delli Paoli rested on the admissibility of evidence in federal, not state, courts. The introduction of evidence in state courts is exclusively governed by state law unless its introduction would violate some federal constitutional provision and there is no such federal provision here. See Spencer v. State of Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606. That being so, any error in admitting the accomplice's pretrial statements is only an error of state law, and Chapman, providing a federal constitutional harmless-error rule, has absolutely no relevance here. Instead of looking at the harmless-error test applied by the California Supreme Court in order to ascertain whether it comports with Chapman, I would make it clear that this Court is leaving to the States their unbridled power to

control their own state courts in the absence of conflicting federal constitutional provisions.

III.

One witness who identified Gilbert at the guilt stage of his trial and eight witnesses who identified him at the penalty stage testified on direct examination that they had identified him in the auditorium lineup. I agree with the Court that the admission of this testimony was constitutional error and that Gilbert is entitled to a new trial unless the state courts, applying Chapman, conclude that this error was harmless. However, these witnesses also identified Gilbert in the courtroom and two other witnesses at the guilt stage identified him solely in the courtroom. As to these, the Court holds that '(t) he admission of the in-court identifications without first determining that they were not tainted by the illegal lineup * * * was constitutional error.' I dissent from this holding in this case and in United States v. Wade, 388 U.S., p. 243, 87 S.Ct., p. 1941, for the reasons there given.

For the reasons here stated, I would vacate the judgment of the California Supreme Court and remand for consideration of whether the admission of the handwriting exemplars and the out-of-court lineup identification was harmless error.*

Mr. Justice WHITE, whom Mr. Justice HARLAN and Mr. Justice STEWART join, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but for the reasons stated in my separate opinion in United States v. Wade, 386 U.S. 250, 87 S.Ct. 1944, 18 L.Ed.2d 1170, I dissent from Part IV of the Court's opinion and would therefore affirm the judgment of the Supreme Court of California.

Mr. Justice FORTAS, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I concur in the result—the vacation of the judgment of the California Supreme Court and the remand of the case—but I do not believe that it is adequate. I would reverse and remand for a new trial on the additional ground that petitioner was entitled by the Sixth and ***291** Fourteenth Amendments to be advised that he had a right to counsel before and in connection with his response to the prosecutor's demand for a handwriting exemplar.

1. The giving of a handwriting exemplar is a 'critical stage' of the proceeding, as my Brother BLACK states. It is a 'critical stage' as much as is a ****1966** lineup. See United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149. Depending upon circumstances, both may be inoffensive to the Constitution, totally fair to the accused, and entirely reliable for the administration of justice. On the other hand, each may be constitutionally offensive, totally unfair to the accused, and prejudicial to the ascertainment of truth. An accused whose handwriting exemplar is sought needs counsel: Is he to write 'Your money or your life?' Is he to emulate the holdup note by using red ink, brown paper, large letters, etc? Is the demanded handwriting exemplar, in effect, an inculpation—a confession? Cf. the eloquent arguments as to the need for counsel, in the Court's opinion in United States v. Wade, supra.

2. The Court today appears to hold that an accused may be compelled to give a handwriting exemplar. Cf. Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Presumably, he may be punished if he adamantly refuses. unlike blood, handwriting cannot be extracted by a doctor from an accused's veins while the accused is subjected to physical restraint, which Schmerber permits. So presumably, on the basis of the Court's decision, trial courts may hold an accused in contempt and keep him in jail—indefinitely—until he gives a handwriting exemplar.

This decision goes beyond Schmerber. Here the accused, in the absence of any warning that he has a right to counsel, is compelled to cooperate, not merely to submit; to engage in a volitional act, not merely to suffer the inevitable consequences of arrest and state custody; to take affirmative action which may not merely identify ***292** him, but tie him directly to the crime. I dissented in Schmerber. For reasons stated in my separate opinion in United States v. Wade, supra, I regard the extension of Schmerber as impermissible.

In Wade, the accused, who is compelled to utter the words used by the criminal in the heat of his act, has at least the comfort of counsel—even if the Court denies that the accused may refuse to speak the words—because the compelled utterance occurs in the course of a lineup. In the present case, the Court deprives him of even this source of comfort and whatever protection counsel's ingenuity could provide in face of the Court's opinion. This is utterly insupportable, in my respectful opinion. This is not like fingerprinting, measuring, photographing—or even blood-taking. It is a process involving the use of discretion. It is capable of abuse. It is in the stream of inculpation. Cross-examination can play only a limited role in offsetting false inference or misleading coincidence from a 'stacked' handwriting exemplar. The

Court's reference to the efficacy of cross-examination in this situation is much more of a comfort to an appellate court than a source of solace to the defendant and his counsel.

3. I agree with the Court's condemnation of the lineup identifications here and the consequent in-court identifications, and I join in this part of its opinion. I would also reverse and remand for a new trial because of the use of the handwriting exemplars which were unconstitutionally obtained in the absence of advice to the accused as to the availability of counsel. I could not conclude that the violation of the privilege against self-incrimination implicit in the facts relating to the exemplars was waived in the absence of advice as to counsel. In re Gault, 387 U.S. 1, 38—39, 87 S.Ct. 1428, 1449—1450, 18 L.Ed.2d 527 (1967); Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

All Citations

388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178

Footnotes

1 The California Supreme Court also held that '* * * the (erroneous) admission of King's statements at the trial on the issue of guilt was not prejudicial on the question of Gilbert's penalty,' again citing Fahy, 63 Cal.2d, at 702, 47 Cal.Rptr., at 916, 408 P.2d, at 372.

2 The record in Gilbert v. United States, 9 Cir., 366 F.2d 923, involving the federal prosecutions of Gilbert, apparently contains many more details of what occurred at the lineup. The opinion of the Court of Appeals for the Ninth Circuit states, 366 F.2d, at 935:

'The lineup occurred on March 26, 1964, after Gilbert had been indicted and had obtained counsel. It was held in an auditorium used for that purpose by the Los Angeles police. Some ten to thirteen prisoners were placed on a lighted stage. The witnesses were assembled in a darkened portion of the room, facing the stage and separated from it by a screen. They could see the prisoners but could not be seen by them. State and federal officers were also present and one of them acted as 'moderator' of the proceedings.

'Each man in the lineup was identified by number, but not by name. Each man was required to step forward into a marked circle, to turn, presenting both profiles as well as a face and back view, to walk, to put on or take off certain articles of clothing. When a man's number was called and he was directed to step into the circle, he was asked certain questions: where he was picked up, whether he owned a car, whether, when arrested, he was armed, where he lived. Each was also asked to repeat certain phrases, both in a loud and in a soft voice, phrases that witnesses to the crimes had heard the robbers use: 'Freeze, this is a stickup; this is holdup; empty your cash drawer; this is a heist; don't anybody move.'

'Either while the men were on the stage, or after they were taken from it, it is not clear which, the assembled witnesses were asked if there were any that they would like to see again, and told that if they had doubts, now was the time to resolve them. Several gave the numbers of men they wanted to see, including Gilbert's. While the other prisoners were no longer present, Gilbert and 2 or 3 others were again put through a similar procedure. Some of the witnesses asked that a particular prisoner say a particular phrase, or walk a particular way. After the lineup, the witnesses talked to each other; it is not clear that they did so during the lineup. They did, however, in each other's presence, call out the numbers of men they could identify.'

3 There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 A.L.R.2d 449. It was been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial. See 5 A.L.R.2d Later Case Service 1225—1228. That is the California rule. In People v. Gould, 54 Cal.2d 621, 626, 7 Cal.Rptr. 273, 275, 354 P.2d 865, 867, the Court said:

'Evidence of an extra-judicial identification is admissible, not only to corroborate an identification made at the trial (People v. Slobodion, 31 Cal.2d 555, 560, 191 P.2d 1), but as independent evidence of identity. Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached * * * evidence of an extra-judicial identification is admitted regardless of whether the testimonial identification is impeached, because the earlier

identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. * * * The failure of the witness to repeat the extra-judicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances. The extra-judicial identification tends to connect the defendant with the crime, and the principal danger of admitting hearsay evidence is not present since the witness is available at the trial for cross-examination.' New York deals with the subject in a statute. See N.Y.Code Crim.Proc. s 393—b.

** On that phase of the case I agree with Mr. Justice BLACK and Mr. Justice FORTAS.

* The Court dismisses as improvidently granted the Fourth Amendment search-and-seizure question raised by Gilbert in this case. I dissent from this, because I would decide that question against Gilbert. However, since the Court refuses to decide that question, I see no reason for expressing my views at length.

424 F.2d 177
United States Court of Appeals, Fifth Circuit.

Francis J. HIGGINS, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Director, Division of Corrections, State of Florida, Respondent-Appellee.

No. 28832 Summary Calendar.
|
March 25, 1970.

Synopsis

Proceeding on appeal from an order of the United States District Court for th of the United States District Court for the Southern District of Florida, Ted Cabot, J., denying, without evidentiary hearing, petition by state prisoner for writ of habeas corpus. The Court of Appeals held that defendant's refusal to speak for identification purposes during lineup was not exercise of privilege against self-incrimination, and thus evidence of his refusal to speak did not violate any constitutional right.

Affirmed.

Attorneys and Law Firms

***177** Francis J. Higgins, pro se.

Charles Musgrove, J. Terrell Williams, Asst. Atty. Gen., West Palm Beach Fla., for respondent-appellee.

Before BELL, AINSWORTH, and GODBOLD, Circuit Judges.

Opinion

***178** PER CURIAM.

This appeal is taken from an order of the district court denying without an evidentiary hearing the petition of a Florida convict for the writ of habeas corpus. We affirm.[1]

Appellant was convicted by a jury and is presently serving a life sentence for armed robbery. In his petition for the writ of habeas corpus filed in the court below, appellant asserted three grounds for relief:

One, a witness for the state testified that appellant at a pretrial line-up replied 'No comment' when requested to repeat the words used by one of the perpetrators of the robbery in question. Appellant contends that in allowing such testimony the trial court penalized him for exercising his right against self-incrimination.

The privilege against self-incrimination is not violated by compelling an accused to speak the words allegedly uttered by the robber for purposes of identification. United States v. Wade, 1967, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149. Thus, appellant's refusal to speak for identification purposes was not an exercise of the privilege against self-incrimination and evidence of his refusal to speak did not violate any constitutional right.

Two, appellant contends that the trial court erred in not instructing the jury on the lesser included offense of larceny. Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair. McDonald v. Sheriff of Palm Beach, Florida, 5 Cir., 1970, 422 F.2d 839, Murphy v. Beto, 5 Cir., 1969, 416 F.2d 98; Gomez v. Beto, 5 Cir., 1968, 402 F.2d 766. Here, there was no request for such an instruction. The trial judge's failure to instruct on the lesser offense of larceny, under the circumstances of this case, did not deny appellant a fair trial.

Three, appellant contends that the prosecuting attorney made a prejudicial statement to the jury during closing arguments. It appears from the record that no objection was made to this statement at the time of trial. Even assuming objection, we conclude that the statement complained of did not rise to the level of a denial of due process when considered in light of the evidence adduced against appellant.

Affirmed.

All Citations

424 F.2d 177

Footnotes

1 Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the Clerk to place the case on the Summary Calendar and to notify the parties in writing. See Murphy v. Houma Well Service, 5th Cir. 1969, 409 F.2d 804, Part I; and Huth v. Southern Pacific Company, 5th Cir. 1969, 417 F.2d 526, Part I.

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2014 WL 285089
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Fatin JOHNSON, Petitioner,

v.

Thomas LaVALLEY, Superintendent,
Clinton Correctional Facility, Respondent.

No. 11 Civ. 3863(LGS).
|
Jan. 24, 2014.

OPINION

LORNA G. SCHOFIELD, District Judge.

***1** Petitioner Fatin Johnson ("Johnson") brings this *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction following trial of second-degree depraved-indifference murder and third-degree criminal possession of a weapon in New York State Supreme Court, New York County. This case was referred to the Honorable Michael H. Dolinger for a report and recommendation (the "Report"). The Report was filed on May 13, 2013, and recommends that the writ be denied. Johnson has objected to the Report. For the following reasons the Report is adopted, and the petition is denied.

I. Background

The facts relevant to Johnson's petition are set out in the Report and summarized here. On July 28, 1998, on a street in upper Manhattan, Johnson argued with his brother, shot his brother in the back and fatally wounded him. (MJ 3). Johnson fled the jurisdiction and was apprehended in 2002. He was charged with two counts of second-degree murder—intentional and depraved-indifference murder—and second—and third-degree possession of a weapon.

Before trial, the court denied Johnson's application for any line-up to be a sequential, double-blind lineup (the potential perpetrators shown one at a time by a law-enforcement representative with no knowledge of the case). At the conventional lineup that occurred, two eyewitnesses identified Johnson as the shooter. (MJ 3).

Johnson's jury trial began in New York Supreme Court on April 14, 2004, with Justice Renee White presiding. The state presented two eyewitnesses who identified Johnson as the shooter both in court and in the line-up; Johnson's former girlfriend who recounted his admission to her of shooting his brother; evidence of Johnson's flight and other evidence. At the conclusion of the State's case, defense counsel unsuccessfully sought dismissal on the ground that the evidence was insufficient to identify Johnson as the shooter. In his defense, Johnson called one eyewitness, who was a 12–year–old boy at the time of the shooting, and Johnson himself testified that he had had no involvement in the shooting. At the conclusion of the presentation of the evidence, defense counsel again unsuccessfully moved to dismiss. This time, however, he argued that the State had failed to prove intent with regard to either murder charge. [No mention of Manslaughter at 576–577, would be by inference, *see* MJ 31] Johnson did not object to the jury charge for depraved-indifference murder.

On April 28, 2004, the jury convicted Johnson of depraved-indifference murder and third-degree weapon possession, and acquitted him of intentional murder and second degree weapon possession. Justice White sentenced Johnson to a term of 25 years to life on the murder conviction and a concurrent term of seven years on the weapon charge. (MJ 5–6)

Johnson appealed to the Appellate Division, First Department. His attorney argued that: (1) the trial court erred in denying his application for a sequential, double-blind lineup, (2) the evidence was insufficient to support a conviction for depraved-indifference murder, including that trial counsel's failure to preserve the sufficiency claim was ineffective assistance of counsel; and (3) the conviction had been against the weight of the evidence. (MJ 6). Johnson also filed a *pro se* brief arguing (1) the unreliability of the eye witness testimony, the inadequate weight of the evidence, (2) ineffective assistance of counsel relating to the grand jury and the questioning of witnesses at trial, and (3) other arguments not relevant here. (MJ 7).

***2** The Appellate Division, by majority opinion, affirmed Johnson's conviction. *People v. Johnson,* 43 A.D.3d 288, 842 N.Y.S.2d 369 (1st Dep't 2007) ("Johnson I"). It held that the evidence of Johnson's responsibility for the shooting was "overwhelming[ ]." *Id.* at 288, 842 N.Y.S.2d 369. As to the depravedindifference conviction, the panel first

observed that Johnson concededly had not preserved his sufficiency argument and would not review it in the interest of justice. *Id* at 289–90, 842 N.Y.S.2d 369. The panel alternatively addressed the merits of the sufficiency claim and held that the evidence was sufficient measured by the charge as given. *Id.* at 290, 842 N.Y.S.2d 369. The panel declined to review the weight of the evidence argument (MJ 10–13, unclear why). The majority rejected Johnson's remaining arguments including the challenge to the lineup and ineffective assistance. *Id.* at 294, 842 N.Y.S.2d 369. Two of the justices dissented regarding the sufficiency and weight of the evidence holdings of the majority. *Id.* at 294–97, 842 N.Y.S.2d 369. (MJ 9–11).

The New York Court of Appeals granted leave to appeal on September 18, 2007. *People v. Johnson,* 10 N.Y.3d 875, 860 N.Y.S.2d 762, 890 N.E.2d 877 (2008). Johnson argued that (1) the denial of his lineup application had been an abuse of discretion, and (2) the First Department had not properly assessed the weight of the evidence. The court affirmed as to the lineup decision and remanded to the Appellate Division to allow that court to assess the weight of the evidence in light of the elements of the crime as charged to the jury. (MJ 12–13). Neither the parties nor the Court of Appeals addressed the sufficiency of the evidence.

On remand to the Appellate Division, Johnson argued that the verdict was against the weight of the evidence measured by both a subjective and objective standard. A majority of the panel again affirmed the conviction and found that the verdict was not against the weight of the evidence as measured by an objective test of depraved-indifference, as charged to the jury. *People v. Johnson,* 67 A.D.3d 448, 891 N.Y.S.2d 306 (1st Dept.2009). (MJ 15)

Johnson again obtained leave to appeal to the Court of Appeals, which affirmed and held that the Appellate Division majority had properly assessed the weight of the evidence in light of the charge as given. (MJ 18–19)

Johnson filed the instant habeas petition as of April 22, 2011, and makes three arguments: (1) he was denied a fair trial because the trial judge denied his application for a sequential, double-blind lineup; (2) the evidence was insufficient to show that he was guilty of depravedindifference murder rather than intentional murder, and did not show "uncommon brutality" as allegedly required; and (3) trial counsel's failure to preserve the sufficiency of the evidence claim constituted ineffective assistance of counsel.[1]

II. Legal Standard

A district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). The district court "may adopt those portions of the report to which no 'specific, written objection' is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." *Adams v. N.Y. State Dep't of Educ.,* 855 F.Supp.2d 205, 206 (S.D.N.Y.2012) (citing Fed.R.Civ.P. 72(b), *Thomas v. Arn,* 474 U.S. 140, 149, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)).

***3** The court must make a de novo review of any portions to which petitioner articulates a specific objection to a Magistrate's decision on issues raised before the Magistrate. *See* 28 U.S.C. § 636(b)(1); *United States v. Male Juvenile,* 121 F.3d 34, 38 (2d Cir.1997). When a party makes only conclusory or general objections, or simply reiterates the original arguments made to the Magistrate Judge, the Court will review the report strictly for clear error. *Crowell v. Astrue,* No. 08 Civ. 8019, 2011 WL 4863537, at *2 (S.D.N.Y. Oct.12, 2011) (citing *Pearson–Fraser v. Bell Atl.,* No. 01 Civ. 2343, 2003 WL 43367, at * 1 (S.D.N.Y. Jan. 6, 2003)). Also, "a district court generally should not entertain new grounds for relief or additional legal arguments not presented to the magistrate." *Ortiz v. Barkley,* 558 F.Supp.2d 444, 451 (S.D.N.Y.2008). Even when exercising de novo review, "[t]he district court need not ... specifically articulate its reasons for rejecting a party's objections." *Morris v. Local 804, Int'l Bhd. of Teamsters,* 167 Fed. App'x. 230, 232 (2d Cir.2006)).

Habeas relief under § 2254 may not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1), (d)(2). State court factual findings "shall be presumed to be correct" and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Id.* at 2254(e)(1).

III. Discussion

A. The Exhausted Claim

Johnson argues that the trial court's refusal to grant his request for a sequential, double-blind lineup deprived him of a fair

trial. The Report correctly concludes that Johnson has not satisfied the two-part test required to challenge identification testimony: 1) demonstrating that the identification procedure was unduly suggestive, and if so, then 2) demonstrating that there is not a sufficient indicia of reliability to justify review by the jury. Johnson has not objected to this portion of the Report. Finding no clear error with the Report's reasoning, the claim is denied.

B. The Unexhausted Claims

Johnson argues ineffective assistance of counsel based on his trial counsel's failure to preserve a sufficiency of the evidence challenge, which resulted in the Appellate Division's rejection of his sufficiency claim on appeal. To the extent this is an assertion of an independent Sixth Amendment violation (Obj at 20, 29), the Report correctly concludes that the claim fails to satisfy the ineffective assistance of counsel test established in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Johnson's objection to this portion of the Report simply restates his original argument and fails to show that trial counsel's performance was sufficiently unreasonable to rise to the level of a constitutional violation. He also fails to satisfy the separate requirement of prejudice —that the lawyer's errors, if corrected, would have changed the outcome. As discussed below, the sufficiency claim, even if it had been preserved for appeal, is without merit. Johnson's ineffective assistance argument therefore fails and his petition is denied on this claim.

***4** Johnson argues that the evidence was insufficient to show that he was guilty of depravedindifference murder. The Report correctly concludes that this claim is not subject to habeas review because it was barred on a on a state law ground that is independent of a federal question and adequate to support the judgment. Specifically, the Appellate Division denied Johnson's appeal on the depraved-indifference murder conviction because he had not preserved the sufficiency of the evidence argument for appeal by objecting properly before the trial court. The Report also was correct that Johnson had not established an exception to this general rule by showing (1) cause for the default and prejudice based on his allegation of ineffective assistance of counsel (see discussion above), or (2) a fundamental miscarriage of justice because, as the Report correctly found, Johnson is unable to demonstrate actual innocence.

Johnson objects that his counsel's failure to preserve the sufficiency argument overcomes the procedural bar. (Obj.18–22) This argument is incorrect for the reasons summarized above and discussed in the Report. Johnson's objection also argues the insufficiency of the evidence based on the jury charge as given (Obj.22–29), which if correct, also would overcome the procedural bar. This argument also fails for the reasons discussed in the Report. Finally, Johnson argues in the objection that the sufficiency argument was preserved for appeal. This challenge to the Appellate Division's ruling is not an issue for habeas review because it is a challenge to the Appellate Division's application of state and not federal law, *see* 28 U.S.C. §§ 2254(d)(1), and in any event is incorrect, as the Report correctly found.

The Report did acknowledge "possibly colorable arguments" on three issues. The first was whether the Appellate Division's rejection of the sufficiency claim was based on a state law ground *independent* of a federal question, because the Appellate Division arguably may have addressed the merits in an alternative holding to the procedural bar. (MJ 40–42). The second issue was the adequacy of the state rule that the sufficiency of the evidence must be judged on the basis of the elements as stated in the unobjected-to jury charge, when the New York law on depraved-indifference murder changed between 2004 when the charge was given, and 2010 when the conviction became final. (MJ 48–50). The third and closely related issue is the difference between 2004 and 2010 in the depraved-indifference murder elements that distinguish it from intentional murder. In 2004, the focus of the crime was an objective test of the risk presented by the Defendant's reckless conduct. By 2010, the New York Court of Appeals had discarded the objective test and required instead a subjective state of mind of depraved recklessness. *See People v. Register,* 60 N.Y.2d 270, 277, 469 N.Y.S.2d 599, 457 N.E.2d 704 (1983), *overruled by People v. Feingold,* 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006). (ML 55–61). The Report correctly found that, even if any of these issues were resolved in favor of Johnson, he still would not have prevailed on his sufficiency of the evidence argument.

IV. Certificate of Appealability

***5** The Report recommended, and this Court agrees, that a certificate of appealability should issue under 28 U.S.C. § 2253(c), if Johnson files a notice of appeal. *See* Fed R.App. P. 22(b). "To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that ... includes showing that reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel,* 529 U.S. 473, 483–84,

120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (quotations omitted). This Court finds that Petitioner has made a substantial showing of a denial of a constitutional right on the sufficiency of the evidence supporting the depraved-indifference murder charge, particularly, in light of cases granting habeas petitions to defendants convicted of depraved-indifference murder around the same time as Petitioner on the basis of the change in the law. *See Fernandez v. Smith,* 558 F.Supp.2d 480 (S.D.N.Y.2008); *Petronio v. Walsh,* 736 F.Supp.2d 640 (E.D.N.Y.2010).

V. Conclusion

For the reasons stated above, Magistrate Judge Dolinger's Report is adopted and the Petition for a writ of habeas corpus is denied.

The Clerk of Court is directed to close this case.

REPORT & RECOMMENDATION

MICHAEL H. DOLINGER, United States Magistrate Judge.

TO THE HONORABLE WILLIAM H. PAULEY, U.S.D.J.:

Pro se petitioner Fatin Johnson seeks a writ of habeas corpus in a challenge to his 2004 conviction in New York State Supreme Court, New York County, on single counts of second-degree "depraved indifference" murder and third-degree criminal possession of a weapon. The court sentenced Johnson to an indeterminate prison term of 25 years to life.

Johnson presses two grounds for relief in his petition. First, he contends that he was denied a fair trial because the police used a lineup that did not involve a so-called "sequential and double blind" procedure. (Pet. 5–10; Pet'r Mem. 10–12). Second, he argues that the evidence was insufficient to permit his conviction on a depraved-indifference theory, either because it showed that he had acted with intent to kill, or because it failed to demonstrate the requisite degree of depravity or brutality. (Pet. 11; Pet'r Mem. 13–24). In Johnson's accompanying memorandum of law, he also contends that his trial attorney was constitutionally ineffective in failing to preserve the evidentiary-insufficiency claim. (Pet'r Mem. 24).[1] Respondent argues that the lineup claim is not of constitutional dimension and that the evidentiary-sufficiency claim is both procedurally barred and meritless. (Resp't Mem. 23–37, 52–53). As for the Sixth Amendment claim, respondent asserts that it is unexhausted and meritless. (*Id.* at 38–51).

For the reasons that follow, we recommend that the writ be denied and the petition dismissed with prejudice.

Prior Proceedings

***6** The charges against Johnson stemmed from an argument between him and his brother Amir Johnson, which took place on July 28, 1998, at the corner of 102nd Street and First Avenue. According to eyewitnesses, at some point in the confrontation, Fatin Johnson pulled out a gun, and as Amir tried to run away, Fatin fired a single shot, striking his brother in the back and fatally wounding him. (Resp't App. Ex. C at 1).

Johnson fled, and was not discovered until 2001, when he was reported to be living in North Carolina. New York law enforcement authorities transported him back to New York in February 2002 and a grand jury returned an indictment charging him with two counts of second-degree murder —for intentional and depraved-indifference murder—and individual counts of second-and third-degree possession of a weapon. (Tr. 8–10).

Before trial the State placed Johnson in a lineup. In anticipation of this step, Johnson applied to the court to compel the use of a sequential, double-blind lineup,[2] an application that the court denied. At the conventional lineup, two eyewitnesses positively identified Johnson as the shooter. (Resp't App. Ex. A at 3–4, Ex. C at 2).

Johnson went to trial on April 14, 2004 before the Hon. Renee White, S.C.J., and a jury. Among others, the State presented the testimony of two witnesses—Pedro Menendez[3] and Winston Nichols—who had seen the shooting and who identified Fatin Johnson as the shooter. (Tr. 230–44, 375–96). The state also presented as witnesses Tiffany Alexander, who reported that shortly before the incident Johnson had asked her if she had seen his brother (Tr. 502–09), and Johnson's former girlfriend Lanette Ruiz, who recounted his admission to her that he had just shot his brother. (Tr. 182–84, 219). In addition, a medical examiner testified as to the victim's cause of death. (Tr. 73–80). The State also called several police witnesses, who recounted that three years after the shooting, Johnson was located in North Carolina and was returned to New York to face charges. (Tr. 61, 346). One officer also confirmed that Messrs. Menendez and Nichols had identified

Johnson in a lineup as the shooter. (Tr. 347; *see also* Tr. 267–70, 414–15). At the conclusion of the State's case, defense counsel unsuccessfully sought dismissal on the basis that the evidence did not suffice to demonstrate that Johnson was the shooter. (Tr. 528).

On petitioner's case, he called a boy who was twelve years old at the time of the shooting and who, at the time, had described the incident to a police detective as involving an assailant who may have belonged to the Bloods gang and whose appearance differed from the physical descriptions of the State's eyewitnesses. (Tr. 557–60, 570–71). Johnson himself also testified, disavowing any involvement in the shooting and asserting that he had been in an entirely different location at the time, selling drugs. (Tr. 536–43). He admitted that, upon hearing of his brother's death and the fact that the police were looking for him, he had left the state and ended up in North Carolina. (Tr. 539–45).

***7** At the conclusion of the presentation of evidence, defense counsel again unsuccessfully sought dismissal of the two murder charges. Unlike his earlier dismissal application, counsel argued that the State had failed to prove intent to kill, as required for intentional murder, and then, with respect to the depraved-murder count, he stated in passing and without any elaboration that the evidence failed to prove intent on that charge as well. (Tr. 576–77).

On April 28, 2004, the jury acquitted petitioner of intentional murder but convicted him of depraved-indifference murder. The jury also acquitted him of second-degree weapon possession, but convicted him of third-degree weapon possession. (Tr. 770–74). On May 18, 2004, Justice White sentenced Johnson to a term of 25 years to life on the murder conviction and a concurrent term of seven years on the weapon charge. (Resp't App. Ex. A at 13).

Johnson appealed to the Appellate Division, First Department. In his attorney's brief he raised two arguments —that the trial court had erred in denying his pretrial application that the police conduct a sequential, double-blind lineup, and that the evidence was insufficient to establish depraved-indifference murder. (Resp't App. Ex. A at 13–29), On this second point he argued both that the evidence overwhelmingly proved an intent to kill by the shooter, and that it did not demonstrate the degree of brutality necessary to show that the shooter had acted with depravity. He also argued alternatively that the conviction had been against the weight of the evidence. (*Id.* at 16–28). In addition, as an adjunct to counsel's argument about evidentiary sufficiency, he mentioned that the failure of trial counsel to preserve the sufficiency claim amounted to ineffective assistance of counsel. (*Id.* at 28).

Johnson himself filed a supplemental *pro se* brief, in which he pursued four arguments. First, he complained that the prosecutor had not timely turned over *Brady* material and that the medical examiner had improperly altered her findings at or near the time of trial. (Resp't App. Ex. B at 6–11). Second, he asserted that the prosecution's eyewitness testimony was so unreliable and inconsistent that his guilt had not been proven beyond a reasonable doubt. Alternatively, he asserted that the weight of the evidence did not support his involvement in the shooting and that the court had erred in not allowing him to offer evidence of the unreliability of cross-racial identifications. (*Id.* at 12–28). Third, he complained that he had been denied the effective assistance of trial counsel, citing (1) his attorney's failure to challenge the indictment for lack of sufficient grand-jury evidence, (2) the lawyer's purported inadequacy in cross-examining the eyewitnesses to the shooting, and (3) counsel's failure to take advantage of an asserted change in testimony by the medical examiner. (*Id.* at 28–34). Fourth, he argued that the prosecutor had denied him a fair trial by knowingly presenting, and failing to correct, perjured testimony and incompetent testimony (apparently in the form of the medical examiner's account of the cause of death) and by failing to turn over pertinent grand jury minutes. (*Id.* at 35–41).

***8** In response, the State argued (answering the *pro se* brief) that the evidence was ample to establish that Johnson was the shooter. It asserted that the other version of the insufficient-evidence argument—that the proof could not establish depraved-indifference murder—was unpreserved and should not be reviewed in the interest of justice,[4] but that, in any event, the evidence sufficed to convict Johnson on that charge and the conviction was not against the weight of the evidence. (Resp't App. Ex. C at 16–26). It further asserted that the trial court had properly rejected the defense application for a sequential, double-blind lineup, and that defense counsel had provided effective representation to Johnson. (*Id.* at 27–41).

Johnson's counsel filed a reply brief, which focused solely on the depraved-indifference question. In substance, she reiterated that the evidence had shown a killing accomplished by a single shot to the victim's back, purportedly at "close range," and argued that these circumstances were not

consistent with the required state of mind for a depraved-indifference killing. (Resp't App. Ex. D at 2–8).

By majority opinion issued October 9, 2007, the Appellate Division affirmed Johnson's conviction. *People v. Johnson,* 43 A.D.3d 288, 842 N.Y.S.2d 369 (1st Dep't 2007) (hereinafter *"Johnson I"*).[5] It first held that the evidence of Johnson's responsibility for the shooting was "overwhelming [ ]." *Id.* at 288, 842 N.Y.S.2d at 370. As for Johnson's attack on the depraved-indifference conviction, it described his contentions as a two-fold argument—that the evidence was consistent only with an intentional murder, and that even if it could be reconciled with a finding of recklessness, it did not demonstrate "uncommon brutality," which defendant argued was an element of that crime. *Id.* at 289, 842 N.Y.S.2d at 371. The panel first noted that Johnson had concededly not preserved his sufficiency argument on the depraved-indifference charge at trial, and it stated that it would not review it in the interest of justice. *Id.* at 289–90, 842 N.Y.S.2d at 371. Having so ruled, however, the court went on alternatively to address the merits of the sufficiency claim. In doing so, it noted that "at the most, given defendant's failure to voice any objection to the court's charge on the elements of the crime of depraved indifference murder, any challenge to the sufficiency of the evidence that defendant may be entitled to raise must be evaluated according to the court's charge as given." *Id.* at 290, 842 N.Y.S.2d at 371 (citing *People v. Sala,* 95 N.Y.2d 254, 260, 716 N.Y.S.2d 361, 364, 739 N.E.2d 727 (1995); *People v. Dekle,* 56 N.Y.2d 835, 837, 452 N.Y.S.2d 565, 569 (1982)). With that introduction, the court went on to hold that the evidence was sufficient to sustain the depraved-indifference conviction since the jury could have concluded that Johnson had not intended to kill his brother and that he had acted with an intent to cause serious injury and with the requisite recklessness, and that he had acted with a depraved indifference to human life. *Johnson I,* 43 A.D.3d at at 290, 842 N.Y.S.2d at 371–72.

***9** The court also went on to note that, absent review in the interest of justice, the defendant could not prevail on his weight-of-the-evidence argument. It further observed that in reviewing such a claim, it must assess the weight of the evidence in light of the charge as given, since the defendant had not objected to that charge. It then explicitly declined to review the weight-of-the-evidence argument in the interest of justice. *Id.* at 290–93, 842 N.Y.S.2d at 372–74.

The panel then proceeded to reject Johnson's remaining arguments, holding that the trial court's denial of a sequential, double-blind lineup did not justify reversal. *Id.* at 293, 842 N.Y.S.2d at 374. As for the ineffective-counsel claim, the court noted that most of the attorney's purported errors were outside the trial record and, thus, not properly raised on appeal, and that, to the extent that the existing record reflected on the attorney's performance, his trial counsel had been constitutionally effective. *Id.* at 294, 842 N.Y.S.2d at 374.

Two of the justices dissented. In doing so, they took issue with the panel's refusal to invoke interest-of-justice review of the depraved-indifference murder conviction. They further argued that the evidence was insufficient to permit conviction on that count because the killing was unquestionably intentional, and they additionally concluded that the conviction was against the weight of the evidence. *Id.* at 294–97, 842 N.Y.S.2d 369, 842 N.Y.S.2d at 374–77 (Andrias, J ., dissenting).

Granted leave to appeal to the New York Court of Appeals (Certificate Granting Leave dated Sept. 18, 2007),[6] Johnson pursued arguments with respect to both the lineup question and the evidence supporting the depraved-indifference conviction. On the lineup issue, he argued that the trial court had had the authority to order the requested procedures for the lineup, and that its failure to do so had been an abuse of discretion. (Resp't App. Ex. F at 26–43). As for the evidentiary question, petitioner did not address sufficiency, and instead focused solely on the Appellate Division's rejection of his argument that the conviction had been against the weight of the evidence. In substance, he made two arguments—that in doing a weight-of-the-evidence analysis, the First Department had not engaged in the required full review of the record, including assessing the credibility of the witnesses and the relative strength of the conflicting inferences permitted by the credible evidence, and that, under applicable state law, the evidence of a one-on-one shooting was insufficient to support a conviction for depraved-indifference murder. (*Id.* at 44–66).

In the State's responding brief, it argued that the Appellate Division had properly undertaken a so-called "elements-based review," as required in assessing a "weight of the evidence" argument, and that it had correctly divined the legal standards applicable to the depraved-indifference-murder charge and applied them to the question of whether the verdict was against the weight of the evidence. (Resp't App. Ex. G at 21–43). The prosecutor also addressed the lineup point, asserting that the trial court had properly denied Johnson's request for a sequential, double-blind lineup. (*Id.* at 44–55).

***10** The Court of Appeals affirmed with respect to the lineup question. In doing so, it chose not to opine as to whether the trial judge had discretion to impose the conditions requested by the defendant, but held that the judge had not abused her discretion in declining to do so, and in determining "that the conventional simultaneous lineup requested by the People was warranted." *People v. Johnson,* 10 N.Y.3d 875, 878, 860 N.Y.S.2d 762, 764, 890 N.E.2d 877 (2008) (hereinafter *"Johnson II"*). As for the evidentiary question, the Court focused on the Appellate Division's "weight of the evidence" analysis and observed that the lower panel had expressly relied on its assessment of the credibility of witnesses, but it also noted that the Appellate Division majority had not stated "that it assessed the evidence in light of the elements of the crime as charged to the jury." The Court further observed that the Appellate Division majority opinion did not otherwise indicate that the appellate judges had engaged in that required analysis. *Id.* at 78, 860 N.Y.S.2d at 764, 890 N.E.2d 877. Accordingly, the Court of Appeals remanded to the Appellate Division "so that it may make that assessment." *Id.* at 78, 860 N.Y.S.2d at 764, 890 N.E.2d 877. The Court did not discuss the sufficiency of the evidence.

On remand, Johnson argued on two grounds that the verdict was against the weight of the evidence. First, he asserted that, in light of the jury instructions—which he contended had told the jury to apply a subjective test to the depraved-indifference charge the prosecutor had to prove that his mental state had been "depraved," and that the State had failed to do so. Second, he asserted that in any event the firing of a single shot in the midst "of a heated argument" that resulted in the death of Amir Johnson could not satisfy the objective standard for depraved-indifference murder, which was the governing law at the time of the trial, because it was consistent only with an intent to kill and because the evidence failed to demonstrate the required brutality emblematic of depraved indifference. (Resp't App. Ex. I at 22–34).

The State, in turn, argued that the applicable standard at the time of trial, and as reflected in the jury charge, was an objective one. The prosecutor then quoted at length from what he termed the Appellate Division's prior "decision ... finding the evidence of depraved conduct was legally sufficient" (Resp't App. Ex. G at 24 (quoting *Johnson I,* 43 A.D.3d at 290, 842 N.Y.S.2d at 371)), and he went on to argue that "the same factors that lent support to [the] Court's sufficiency ruling control the weight-of-the-evidence review as well." (*Id.*). According to the State, that "analysis can lead to only one conclusion: that defendant acted recklessly under circumstances manifesting his utter indifference to his brother's life, as well as the lives of others." (*Id.*).

The Appellate Division once again affirmed the conviction by a majority vote. *People v. Johnson,* 67 A.D.3d 448, 891 N.Y.S.2d 306 (1st Dep't 2009) (hereinafter *"Johnson III"*). In doing so, and consistent with the remand order of the Court of Appeals, the panel addressed only the "weight of the evidence" analysis. It first acknowledged that in its prior decision "we did not expressly state that we rejected defendant's claim that the verdict convicting him of depraved indifference murder was against the weight of the evidence." *Id.* at 448, 891 N.Y.S.2d at 307. It then confirmed its "implicit" finding from the prior decision—that "the verdict was not against the weight of the evidence." In explaining that conclusion, it started with "a review of our prior opinion and its holdings," which involved an extensive quotation from its lengthy earlier assessment that the evidence was "sufficient" to sustain the conviction. *Id.* at 449, 891 N.Y.S.2d at 307–09 (quoting *Johnson* I, 43 A.D.3d at 289–92, 842 N.Y.S.2d at 370–71). It then noted that the Court of Appeals had "not disturb [ed] our holding that the evidence was sufficient or our holdings that both the sufficiency and the weight of the evidence had to be evaluated in light of elements of the crime ... as the elements were charged to the jury without exception." *Id.* at 451, 842 N.Y.S.2d 369, 891 N.Y.S.2d at 309; *see id.* (quoting *People v. Danielson,* 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 484, 880 N.E.2d 1 (2007)).

***11** After summarizing the trial evidence, the court first addressed Johnson's argument that the trial court had charged a subjective test which the proof did not meet. The panel rejected that premise, holding that the jury had been told to apply an objective test. The panel then characterized defendant's second argument as being that the proof could not demonstrate the requisite "reckless mens rea," that is, the firing of the gun did not create such an elevated risk of death as to fall into the category of "depraved indifference murder," as distinguished from manslaughter. The court rejected this argument because it required the analysis to stray from the jury charge, which did not say that the criminal conduct had to create such an elevated risk of death as to be—in defendant's terminology—"transcendent" or to pose "an almost certain risk of death." *Id.* at 453, 891 N.Y.S.2d 306, 891 N.Y.S.2d at 310–11. The majority further rejected the defense's contention that at the time of the trial a "one-on-one shooting" ordinarily could not amount to depraved-indifference murder, noting that the unobjeeted-to charge did not so instruct the jury. *Id.* at

454, 891 N.Y.S.2d at 311. As for Johnson's further argument that the circumstances could not demonstrate the *mens rea* of depraved indifference, the panel observed that the jurors had been called upon by the charge to make a judgment that was largely "moral" and that under the circumstances, including the fact that the defendant had shot his own brother and, in doing so, had fired over the heads of children playing in the street, they were free to decide that his conduct exhibited a depraved indifference to human life. *Id.* at 455–56, 891 N.Y.S.2d at 311–13.

Finally, in rejecting the dissent's view that the conviction was against the weight of the evidence, the majority made two principal points. First, it reiterated that the required analysis was to be predicated on the actual consented-to jury charge, which the dissent did not adhere to. Second, it noted that the dissent had to ignore the panel's express findings in its prior decision tnat tne evidence permitted the jury to find that Johnson had "acted with the recklessness required for depraved indifference murder." *Id.* at 459, 891 N.Y.S.2d at 314–15 (quoting *Johnson I,* 43 A.D.3d at 290–91, 842 N.Y.S.2d at 372). As the majority observed, the dissent's analysis "would simply undo these conclusions, essential to our express holding—which, to repeat, the Court of Appeals did not disturb—that the verdict was supported by legally sufficient evidence. All of the dissent's arguments ... apply with equal force—or more accurately, with an equal lack of force—to our express holding that the verdict was supported by sufficient evidence." *Id.* at 459, 842 N.Y.S.2d 369, 891 N.Y.S.2d at 315. *See also id.* at 459, 891 N.Y.S.2d at 315–16.[7]

Johnson obtained leave to appeal this decision to the Court of Appeals. (*See* Resp't App. Ex. L). The High Court affirmed, holding that the Appellate Division majority had applied the correct legal standard in finding that Johnson's conviction was not against the weight of the evidence. In this regard, the Court noted that Johnson had not objected to the jury charge as given and had made no requests that "specific judicial interpretations of the elements be presented to the jury," and that accordingly the appellate court had properly assessed the evidence in light of the charge as given. *People v. Johnson,* 14 N.Y.3d 917, 919, 904 N.Y.S.2d 691, 692, 930 N.E.2d 765 (2010) (hereinafter *"Johnson IV"*).

***12** Faced with this final rebuff by the state courts, petitioner turned to this court, filing his habeas petition as of April 22, 2011.[8] As noted, he reiterates his contentions from state court (1) that he was denied a fair trial because the trial court refused his application to require a sequential, double-blind lineup and (2) that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of depraved-indifference murder rather than intentional murder, and that, in any event, the evidence did not show "uncommon brutality," as purportedly required for depraved-indifference murder, implying that he should have been convicted, at most, of first-degree manslaughter.[9] (Pet'r Mem. 10–24; Pet'r Reply 15–18, 20). He also reiterates the contention from his counsel's state appellate briefs that his trial attorney had denied him effective representation by not preserving his evidentiary-sufficiency claim. (Pet'r Mem. 24; Pet'r Reply 18–20).

ANALYSIS

We address Johnson's claims in the order in which he presents them. We start by summarizing the applicable habeas standards.

I. *Standard of Review*

The stringency of federal habeas review turns on whether the state courts have passed on the merits of a petitioner's claim, that is, whether the decision of the highest state court to consider the claim is "based on the substance of the claim advanced, rather than on a procedural, or other, ground." *Sellan v. Kuhlman,* 261 F.3d 303, 311 (2d Cir., 2001) (discussing 28 U.S.C. § 2254(d)). If the state court has addressed the merits, the petitioner may obtain relief only if the state court's ruling

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). *See, e.g., Bell v. Cone,* 535 U.S. 685, 693–94, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Williams v. Taylor,* 529 U.S. 362, 412–13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring); *Besser v. Walsh,* 601 F.3d 163, 178 (2d Cir.2010), *vacated on other grounds sub nom. Portalatin v. Graham,* 624 F.3d 69 (2d Cir.2010) (en banc); *Howard v. Walker,* 406 F.3d 114, 121–22 (2d Cir.2005); *Brown v. Artuz,* 283 F.3d 492, 498 (2d Cir.2002).

Clearly established federal law " 'refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions as of

the time of the relevant state-court decision.' " *Howard,* 406 F.3d at 122 (quoting *Kennaugh v. Miller,* 289 F.3d 36, 42 (2d Cir.2002)). "[A] decision is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decided a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.' " *Id.* (quoting *Williams,* 529 U.S. at 413). *See also Marshall v. Rodgers,* —— U.S. ——, ——, 133 S.Ct. 1446, 1448, 185 L.Ed.2d 540 (2013).

***13** What constitutes an "unreasonable application" of settled law is a somewhat murkier proposition. " 'A federal court may not grant habeas simply because, in its independent judgment, the "relevant state-court decision applied clearly established federal law erroneously or incorrectly." ' " *Id.* (quoting *Fuller v. Gorczyk,* 273 F.3d 212, 219 (2d Cir.2001) (quoting *Williams,* 529 U.S. at 411)). The Supreme Court observed in *Williams* that "unreasonable" did not mean "incorrect" or "erroneous," noting that the writ could issue under the "unreasonable application" provision only "if the state court identifies the correct governing legal principle from this Court's decisions [and] unreasonably applies that principle to the facts of the prisoner's case." 529 U.S. at 410–13. As implied by this language, " '[s]ome increment of incorrectness beyond error is required ... [H]owever ... The increment need not be great; otherwise habeas relief would be limited to state court decisions "so far off the mark as to suggest judicial incompetence." ' " *Monroe v. Kuhlman,* 433 F.3d 236, 246 (2d Cir.2006) (quoting *Francis S. v. Stone,* 221 F.3d 100, 111 (2d Cir.2000)); *accord Richard S. v. Carpinello,* 589 F.3d 75, 80 (2d Cir.2009).

Under the Supreme Court's more recent, and arguably more stringent, interpretation of the statutory language, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as *fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter,* —— U.S. ——, ——, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011) (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). "Under § 2254(d), a habeas court must determine what arguments or theories supported or ... could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* Under this more recent interpretation, a federal habeas court has "authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* In other words, to demonstrate an 'unreasonable' application of Supreme Court law, the habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786–87.

As for the state courts' factual findings, under the habeas statute "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Richard S.,* 589 F.3d at 80–81; *McKinney v. Artuz,* 326 F.3d 87, 101 (2d Cir.2003); *see also Rice v. Collins,* 546 U.S. 333, 338–39, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).

II. *The Lineup Claim*

***14** Following petitioner's arrest and return to New York, the prosecutor sought a court order authorizing a lineup that included Johnson, to permit two eyewitnesses to the shooting to make an identification. The petitioner sought a ruling that the police must conduct a sequential, double-blind lineup, that is, one conducted by a person who had no involvement in the investigation of the crime, and in which each witness is shown only one person at a time, rather than viewing the suspect and fillers together. Justice White denied Johnson's application, and accordingly the State conducted a standard lineup for Messrs. Menendez and Nichols, both of whom identified Johnson as the shooter. Johnson then moved to suppress the identification as well as other items, a motion denied by the Hon. Ronald A. Zweibel, S.C.J. (Resp't App. Ex. A at 2, Ex. F at 6–8, Ex. G at 2–3).

In the current petition, as on Johnson's state-court appeal, he claims that he was denied a fair trial based on Justice White's refusal to order that the lineup be conducted in accordance with his request for a sequential, double-blind procedure. The short answer is that his argument, as framed, is not supported by any federal legal authority, and even if defined in federal-lav; terms, it would fail for lack of any factual basis.[10] In any event, the decision of the New York Court of Appeals rejecting this claim did not unreasonably apply any established Supreme Court precedent.

We infer that the premise of petitioner's argument in this habeas proceeding—which must be of federal-law dimension to be cognizable, *e.g., Estelle v. McGuire,* 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Evans v. Fischer,* 712 F.3d 125, 133 (2d Cir.2013)—is that the lineup, because it was conducted in a traditional fashion, was unduly suggestive and led to unreliable trial-court identifications. There is neither legal nor factual authority for such a claim.

When a defendant challenges the admissibility at trial of identification testimony, the Supreme Court has focused on the potentially misleading effects of pre-trial identification procedures to which a witness has been subjected. *See Manson v. Brathwaite,* 432 U.S. 98, 106, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Coleman v. Alabama,* 399 U.S. 1, 5, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970); *Foster v. California,* 394 U.S. 440, 442, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969); *Simmons v. United States,* 390 U.S. 377, 383, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *Stovall v. Denno,* 388 U.S. 293, 298, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), *abrogated on other grounds by Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); *Gilbert v. California,* 388 U.S. 263, 273–74, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *United States v. Wade,* 388 U.S. 218, 241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The Court has developed a two-part test to evaluate challenged identification testimony.[11] The trial judge must first assess whether the pretrial identification procedure—be it a line-up, photo array, show-up, or other technique—was unduly (or "unnecessarily") suggestive. *See Brisco v. Ercole,* 565 F.3d 80, 88 (2d Cir.2009) (citing *Simmons,* 390 U.S. at 384). Identification evidence is "unduly suggestive" when "under all the circumstances of [the] case there is 'a very substantial likelihood of irreparable misidentification.' " *Manson,* 432 U.S. at 116 (quoting *Simmons,* 390 U.S. at 384). If a witness was not subjected to an unduly suggestive procedure, the witness's identification testimony may be accepted into evidence, with the understanding that its reliability will be tested by the adversarial process, including cross-examination, and that its persuasiveness will ultimately be determined by the jury. *See Foster,* 394 U.S. at 442 n. 2; *see also Watkins v. Sowders,* 449 U.S. 341, 348–49, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981); *Raheem v. Kelly,* 257 F.3d 122, 133 (2d Cir.2001); *Dunnigan v. Keane,* 137 F.3d 117, 129 (2d Cir.1998).

***15** If, however, the pretrial procedure was unnecessarily suggestive, then the court must proceed to consider whether the witness's identification of the defendant is buttressed by sufficient independent indicia of reliability. Manson, 432 U.S. at 114 (citing *Neil v. Biggers,* 409 U.S. 188, 199–200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). This inquiry is guided by a variety of suggested factual considerations, which were originally discussed at some length by the Supreme Court in *Biggers,* 409 U.S. at 199–200.[12] If the court finds that the identification was independently reliable, then the identification testimony may be admitted notwithstanding the defects in the pretrial procedures. *See, e.g.,* Manson, 432 U.S. at 114; *Brisco,* 565 F.3d at 89. The "linchpin" of this analysis is "reliability," *Manson,* 432 U.S. at 114, and even though the reliability of witness testimony is presumptively for the jury to determine, the court must exclude identification testimony if "the degree of unreliability leads to 'a very substantial likelihood of misidentification.' " *Kennaugh,* 289 F.3d at 43 (quoting *Manson,* 432 U.S. at 116 (quoting *Simmons,* 390 U.S. at 384)).

Thus, if we treat petitioner's claim as seeking to assert an argument of this type, our initial inquiry must determine whether the lineup procedure in this case was unduly suggestive. Generally, lineups are found to be unduly suggestive only when the defendant is the sole individual in the lineup who meets the description of the perpetrator with respect to an obvious characteristic or a distinctive piece of clothing. *Raheem,* 257 F.3d at 134; *see, e .g., Foster,* 394 U.S. at 443 (finding identification procedure inherently suggestive when defendant's height contrasted with that of the fillers and only defendant wore a leather jacket similar to that worn by the robber); *Frazier v. New York,* 156 Fed. Appx. 423, 425 (2d Cir.2005) (finding lineup impermissibly suggestive since only defendant had dreadlocks of any significant length and such dreadlocks were the most distinctive feature in the description given by the victim who identified him); *United States ex rel. Cannon v. Smith,* 527 F.2d 702, 704 (2d Cir.1975) (finding lineup impermissibly suggestive where defendant was among the few people in the lineup who were instructed by police to wear a green shirt, and victim, who had not seen her assailant's face, based her description on his green shirt). However, "[t]here is no requirement ... That a defendant in a lineup be surrounded by people nearly identical in appearance." *Watkins v. Ercole,* 2008 WL 4179187, at *17 (S.D.N.Y. Sept.9, 2008) (quoting *United States v. Reid,* 517 F.2d 953, 966 n. 15 (2d Cir.1975)); *accord Douglas v. Portuondo,* 232 F.Supp.2d 106, 112 (S.D.N.Y.2002). Instead, when the "appearance of participants in a lineup is not uniform with respect to a given characteristic, the principal question in determining suggestiveness is whether the appearance of the accused ... so stood out from all the others as to suggest to

the witness that that person was more likely to be the culprit." *United States v. Wong,* 40 F.3d 1347, 1359–60 (2d Cir.1994).

***16** A review of Johnson's state appellate briefs and his current petition reflects, however, that he never sought to make a showing that the lineup in which he was placed was unduly suggestive in this manner. Indeed, after unsuccessfully challenging the lineup at a suppression hearing, he did not appeal the decision of Justice Zweibel denying his motion. Instead, he simply argued that Justice White should have ordered the unorthodox—although not unprecedented—procedure that he deemed more reliable.[13] However, whether, as a matter of practice or policy, that format is preferable, there is no federal legal authority requiring its use; indeed, this point is well illustrated by the fact that petitioner has relied exclusively on state-court authorities to support his argument. (Pet'r Mem. 10–11). In addition, petitioner has failed to demonstrate that the lineup, as it was actually handled, involved any undue suggestiveness or was otherwise improperly conducted. Necessarily, then, the state courts' denial of relief was in no way contrary to, or an unreasonable application of, Supreme Court precedent, and petitioner is not entitled to relief on this claim. *See, e.g., Hope v. Kenworthy,* 2011 WL 5599268, at *6–8 (E.D.N.C. Nov.17, 2011) (rejecting habeas challenge based on denial of sequential, double-blind procedures).[14]

III. *The Evidentiary–Sufficiency Claim*

Johnson's second claim reprises his state-court argument that the evidence was insufficient to permit his conviction on the charge of depraved-indifference murder. This argument encompasses two points—(1) that the evidence justified only a conviction for intentional murder, thus precluding the depraved-indifference version of the crime, and (2) that the evidence did not justify a finding that the shooter had engaged in such conduct as would suggest depraved indifference, an argument that implies that the jury should have convicted Johnson of, at most, first-degree manslaughter.

In response, the State argues that the claim is procedurally barred from review and is, in any event, meritless. We agree that the claim is barred and concur as well that it is substantively baseless.

A. *Procedural Bar*

1. *General Criteria*

If the highest state court to address a federal-law claim disposes of it on a "state law ground that is 'independent of the federal question and adequate to support the judgment,' " a federal habeas court may not review that claim unless the petitioner demonstrates both cause for his default and prejudice or else establishes that a failure to address the claim would constitute a fundamental miscarriage of justice. *See, e.g., Cone v. Bell,* 556 U.S. 449, 465, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) (quoting *Coleman v. Thompson,* 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)); *see also Jimenez v. Walker,* 458 F.3d 130, 136 (2d Cir.2006) (citing *Harris v. Reed,* 489 U.S. 255, 260, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)). A state procedural rule can qualify as an adequate and independent state-law ground. *See Harris,* 489 U.S. at 260–61.

***17** To be independent, the state-law holding must rest on state law that is not " 'interwoven with the federal law.' " *Jimenez,* 458 F.3d at 137 (quoting *Michigan v. Long,* 463 U.S. 1032, 1040–41, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)). Since it can be " 'difficult to determine if the state law discussion is truly an independent basis for decision or merely a passing reference,' ... reliance on state law must be 'clear from the face of the opinion.' " *Fama v. Comm'r of Corr. Servs.,* 235 F.3d 804, 809 (2d Cir.2000) (quoting *Coleman,* 501 U.S. at 732, 735). When determining whether we may entertain a claim, we "apply a presumption against finding a state procedural bar and 'ask not what we think the state court actually might have intended but whether the state court plainly stated its intention.' " *Galarza v. Keane,* 252 F.3d 630, 637 (2d Cir.2001) (quoting *Jones v. Stinson,* 229 F.3d 112, 118 (2d Cir.2000)).

In this regard, even if the appellate court rejects the claim as unpreserved and then, in the alternative, notes that if it had reviewed the merits it would have rejected the claim, the ruling is deemed, for this purpose, to have rested on the state-law procedural ground. *See Murden v. Artuz,* 497 F.3d 178, 191 (2d Cir.2007) ("Even where the state court has ruled on the merits of a federal claim 'in the alternative,' federal habeas review is foreclosed where the state court has also expressly relied on the petitioner's procedural default.") (citation omitted); *Green v. Travis,* 414 F.3d 288, 294 (2d Cir.2005); *cf., e.g., Bell v. Miller,* 500 F.3d 149, 155 (2d Cir.2007) (state court's "contingent observation" is not an "adjudication on the merits" for purposes of habeas review).

As for the requirement of adequacy, the state procedural rule must be " 'firmly estabiiahed and regularly followed by the

state in question' in the specific circumstances presented in the instant case." *Murden,* 497 F.3d at 192 (quoting *Monroe,* 433 F.3d at 241); *see Lee v. Kernna,* 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002); *Cotto v. Herbert,* 331 F.3d 217, 239 (2d Cir.2003) (citing *Garcia v. Lewis,* 188 F.3d 71, 77 (2d Cir.1999)). However, principles of comity caution against categorizing a state procedural rule as inadequate "lightly or without clear support in state law." *Garcia,* 188 F.3d at 77 (internal quotation marks omitted).

Once respondent has demonstrated that the state court relied on an independent and adequate ground, it is incumbent upon petitioner to meet one of two recognized exceptions. Under procedural-bar rules, we may not review the merits of the claim unless petitioner can overcome his procedural default by either "demonstrat[ing] cause for the default and actual prejudice as a result of the alleged violation of federal law, or [establishing] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman,* 501 U.S. at 750; *see also Fama,* 235 F.3d at 809.

To demonstrate cause, petitioner must establish that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," for example, by showing that the factual or legal basis for a claim was not reasonably available to counsel or that "some interference by officials ... made compliance impracticable." *Murray v. Carrier,* 477 U.S. 478, 488 (1986) (citing *Reed v. Ross,* 468 U.S. 1, 16, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), and quoting *Brown v. Allen,* 344 U.S. 443, 486, 73 S.Ct. 437, 97 L.Ed. 469 (1953)). A petitioner may also satisfy the cause requirement by demonstrating that the failure of his attorney to comply with state procedural rules denied him constitutionally adequate representation. *See Restrepo v. Kelly,* 178 F.3d 634, 640 (2d Cir.1999). He cannot invoke this ground, however, unless he first asserted an equivalent independent Sixth Amendment claim in state court and exhausted his state-court remedies with respect to that claim. *See, e.g., Edwards v. Carpenter,* 529 U.S. 446, 451–52, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000). In any event, it bears emphasis that "[a] defense counsel's ineffectiveness in failing to properly preserve a claim for review in state court can suffice to establish cause for a procedural default only when the counsel's ineptitude rises to the level of a violation of a defendant's Sixth Amendment right to counsel." *Aparicio v. Artuz,* 269 F.3d 78, 91 (2d Cir.2001).

***18** The second exception—that failure to review petitioner's claims would result in a fundamental miscarriage of justice—is reserved for the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 496; *accord Sawyer v. Whitley,* 505 U.S. 333, 339 n. 6, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). To establish "actual innocence," petitioner must demonstrate that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States,* 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (quoting *Schlup v. Delo,* 513 U.S. 298, 327–28, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)) (internal quotation marks omitted). In this context, "actual innocence means factual innocence, not mere legal insufficiency." *Id.* at 623. Furthermore, the petitioner must support his claim " 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Doe v. Menefee,* 391 F.3d 147, 161 (2d Cir.2004) (quoting *Schlup,* 513 U.S. at 324); *see also Dunham v. Travis,* 313 F.3d 724, 730 (2d Cir.2002).

2. *Assessment of the Procedural–Bar Argument*

Respondent's procedural-bar argument is premised on the contentions that (1) defense counsel failed to preserve a sufficiency challenge because he failed to articulate his trial-court challenge with the required specificity either at the close of the State's case or after both sides had rested, and (2) the Appellate Division explicitly relied on that failing in rejecting this claim on appeal. (Resp't Mem. 27–32). In petitioner's *pro se* briefing here, he does not challenge this assertion, but rather argues, in substance, that his default should be excused for cause, principally based on the contention that his attorney's failure to adequately assert a sufficiency challenge at trial violated his Sixth Amendment right to the effective representation of counsel. (Pet'r Mem. 24–25; Pet'r Reply 18–20).

There is no real question that, at trial, defense counsel did not articulate in a sufficiently specific manner the objection that now forms the predicate for petitioner's claim. At the conclusion of the State's case, counsel sought dismissal solely on the basis that the evidence did not sufficiently link Johnson to the shooting. (Tr. 528). After the close of evidence, counsel renewed his motion to dismiss, but on a different ground. Thus, he stated:

> At this time, Your Honor, the defendant would move for dismissal of the first count of the indictment, murder in the second degree, intentional, and under subdivision one, on the grounds that the People have failed to establish the

intent necessary to satisfy proof beyond a reasonable doubt that Mr. Johnson intended to in fact kill Amir Johnson.

And with respect to the second count, which is the depraved indifference, I believe is 125.00(2), I think the same arguments would apply, not proof beyond a reasonable doubt, which the Court must view the case at this time, since all the evidence is in.

***19** And with respect to those two counts, I will submit to the Court that those two counts should be dismissed.

(Tr. 576–77).

When the petitioner raised his sufficiency arguments on appeal, the State countered that the claim was unpreserved (Resp't App, Ex. C at 21–24), and the Appellate Division agreed. In unambiguous terms, the panel held that the trial attorney's comments at the close of discovery—in which he alluded only in passing to the depraved-indifference count as being inadequately supported—did not articulate a sufficiently specific objection grounded on the theories that Johnson was espousing on appeal. The majority also proceeded to state that it would not exercise the court's interest-of-justice jurisdiction to review the merits of the sufficiency challenge to that conviction: "we decline to review ... The untimely challenges to the sufficiency of the evidence that defendant now advances." *Johnson I,* 43 A.D.3d at 290, 842 N.Y.S.2d at 371. Having done so, the majority then proceeded in the alternative to state that even if Johnson had any ground for presenting the merits of this claim on appeal, the claim was substantively baseless, and the panel then undertook a fairly elaborate analysis of the appellant's arguments to justify that conclusion. *Id.* at 290–91, 842 N.Y.S.2d at 371–72.[15]

The procedural ground on which the panel initially rejected the sufficiency claim was certainly adequate. Under New York law, when a defendant moves to dismiss for insufficient evidence, the argument must be "specifically directed" at the alleged error. *People v. Gray,* 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 175, 652 N.E.2d 919 (1995); *see also People v. Cona* 49 N.Y.2d 26, 33 n. 2, 424 N.Y.S.2d 146, 148 n. 2, 399 N.E.2d 1167 (1979). In other words, a general motion to dismiss is insufficient to preserve an argument that there is insufficient evidence to establish any particular element of a crime. *See, e.g., Gray,* 86 N.Y.2d at 20–21, 629 N.Y.S.2d at 175–76, 652 N.E.2d 919; *People v. Stahl,* 53 N.Y.2d 1048, 1050, 442 N.Y.S.2d 488, 489, 425 N.E.2d 876 (1981). The vague allusion by trial counsel to the failure to prove "intent" on the depraved-indifference count certainly fell within the range of diffuse and unspecific objections that the state's courts have routinely held to be inadequate to preserve a more specifically articulated claim on appeal, *see, e.g., People v. Finger,* 95 N.Y.2d 894, 895, 716 N.Y.S.2d 34, 34, 739 N.E.2d 290 (2000), as petitioner's own appellate counsel conceded. (Resp't App. Ex. A at 27).

The question of independence is a slightly closer one, in view of the practice of the federal courts to parse the state court's articulation of its finding that a claim has not been preserved when it then engages in a discussion of the merits of the unpreserved claim. *See, e.g., Fama,* 235 F.3d at 809–10 & n. 4. In this case, the appellate court did not articulate its merits analysis in the conditional voice, as, for example, by saying that "If we were to consider the claim, we would find it meritless." *See, e.g., id* . at 809–10.[16]

***20** We also note that, on remand, the Appellate Division characterized its earlier merits discussion of the sufficiency question as a "holding," *Johnson III,* 67 A.D.3d at 451, 891 N.Y.S.2d at 309, although that characterization is consistent with the court's earlier assessment of the merits of the claim being an alternative holding. In addition, the panel alluded to the Court of Appeals having not overturned that sufficiency holding, implying that, notwithstanding Johnson's failure at trial to preserve the claim, it was potentially reviewable on the merits not only at the Appellate Division level but also by the Court of Appeals. *Id.* at 451, 891 N.Y.S.2d at 309.

All of this said, and notwithstanding the accepted premise that any ambiguity as to independence should be resolved in favor of concluding that the state court reached the merits of the federal claim, we view the first Appellate Division decision, insofar as it addressed the sufficiency claim, as clearly enough stating that it was relying on an independent state-law ground in rejecting the claim. The panel explicitly stated that the claim was unpreserved and that it would not invoke interest-of-justice jurisdiction to review it. *Johnson I,* 43 A.D.3d at 290, 842 N.Y.S.2d at 371. As for its discussion of the merits, the wording used by the majority made it clear that this was an alternative ground for reaching the same ultimate result. Thus, after declining to invoke its "interest of justice" jurisdiction, it introduced its merits analysis with the word "[m]oreover," reflecting that the following discussion was, at most, an alternative holding. *Id.* at 290, 842 N.Y.S.2d at 371. It then went on to explain that a merits analysis would also lead to rejection of Johnson's sufficiency argument. *Id* . at 290–91, 842 N.Y.S.2d at 371–72.

In sum, the Appellate Division rejection of the sufficiency claim was based on an independent and adequate state-law ground. Accordingly, the claim is barred from habeas review absent satisfaction by Johnson of one of the two recognized exceptions. We conclude that he fails to satisfy either of them.

Johnson does not seek to invoke the "fundamental miscarriage" exception to procedural bar and, in any event, there is no evident basis for applying it here. As noted, its successful invocation requires proof of actual innocence based on new and persuasive evidence. *See, e.g., Schlup,* 513 U.S. at 329. Petitioner does not attempt to make such a showing, and for this reason he is unable to overcome the procedural bar premised on an argument of a fundamental miscarriage of justice.

In seeking to avoid a procedural bar, Johnson appears to argue that the failure of his trial attorney to formulate an adequate objection based on evidentiary sufficiency denied him the effective assistance of counsel (Pet'r Mem. 24), and alternatively that the bar should not apply because the jury verdict involved "an unreasonable application of the facts." (Pet'r Reply 16). Neither argument works.

***21** The reference to an "unreasonable application of the facts" is plainly misconceived. Johnson is presumably referring to section 2254(d), which addresses the standard of review by a habeas court when the state court has reached the merits of a claim; that provision has nothing to do with defining an exception to the procedural-bar analysis.[17]

Although petitioner implies that his claim must necessarily survive if the jury rendered a verdict unsupported by sufficient evidence, that argument is baseless. Were petitioner correct, then any potentially valid claim attacking the sufficiency of the evidence would be able to escape procedural bar, which is plainly not the law. Like all other claims in a habeas proceeding, a sufficiency claim must be deemed barred if the state court denied it on the basis of an independent and adequate state-law ground and the petitioner cannot show cause and prejudice or demonstrate that imposition of the bar would cause a fundamental miscarriage of justice. *See, e.g., Johnson v. Belnier,* 2013 WL 276075, at *2 (2d Cir. Jan.25, 2013); *Hutchinson v. Unger,* 2012 WL 3027845, at *4 (E.D.N.Y. July 23, 2012).

As for Johnson's alternative argument, ineffective assistance—if preserved and exhausted as an independent claim in state court—may provide a ground for finding cause. *See Edwards,* 529 U.S. at 452. We assume, *arguendo,* that petitioner has preserved and exhausted his claim for ineffective assistance of counsel.[18] Nonetheless, as we shall see, petitioner is unable to overcome the procedural bar to his sufficiency claim because the claim is meritless and, accordingly, trial counsel's failure to preserve the claim did not prejudice petitioner. *See generally Aparicio,* 269 F.3d at 91–92 (assessment of prejudice for cause-and-prejudice test requires assessment of merits of claim).

B. *Prejudice & Merits of the Sufficiency Claim*

A habeas petitioner bears a very heavy burden when challenging a conviction on the ground of insufficiency of evidence. *See, e.g.,* Fama, 235 F.3d at 812; *Knapp v. Leonardo,* 46 F.3d 170, 178 (2d Cir.1995). The court is required to consider the trial evidence in the light most favorable to the State, upholding the state-court conviction if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original); *accord, e.g., Wright v. West,* 505 U.S. 277, 296, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); Fama, 235 F.3d at 811; *Bossett v. Walker,* 41 F.3d 825, 830 (2d Cir.1994). In this regard, we must defer to the jury's "assessments of the weight of the evidence and the credibility of witnesses." *Maldonado,* 86 F.3d at 35. Thus, a verdict that is based on such an assessment is not subject to second-guessing by the habeas court, and will not be disturbed. *See, e.g., Herrera v. Collins,* 506 U.S. 390, 400–02, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Quartararo v. Hanslamaier,* 186 F.3d 91, 97 (2d Cir.1999); *accord, United States v. Vasquez,* 267 F.3d 79, 91 (2d Cir.2001); *Rosa v. Herbert,* 277 F.Supp.2d 342, 347 (S.D.N.Y.2003). Under this "rigorous standard," a federal habeas court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and it must defer to that resolution. *Wheel v. Robinson,* 34 F.3d 60, 66 (2d Cir.1994).

***22** When a federal court considers the sufficiency of the evidence for a state conviction, it "must look to state law to determine the elements of the crime." *Ponnapula v. Spitzer,* 297 F.3d 172, 179 (2d Cir.2002) (quoting *Quartararo,* 186 F.3d at 97). The relevant state law is generally that which was in effect when petitioner's conviction became final. *See Fiore v. White,* 531 U.S. 225, 227–28, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). Therefore, Johnson's sufficiency claim

would ordinarily be assessed under the New York Court of Appeals' interpretation of the relevant statute in 2010, when that Court affirmed the decision on remand of the Appellate Division.

That said, the New York courts have long adhered to a rule that when a defendant does not object to a trial judge's instructions regarding the elements of a criminal statute and seeks no supplementation of it, any subsequent claim of insufficient evidence must be judged on the basis of the unobjected-to jury charge. *See, e.g., Sala,* 95 N.Y.2d at 260, 716 N.Y.S.2d at 364, 739 N.E.2d 727; *Dekle,* 56 N.Y.2d at 837, 452 N.Y.S.2d at 569, 438 N.E.2d 101; *People v. Danielson,* 40 A.D.3d 174, 179, 832 N.Y.S.2d 546, 550 (1st Dep't 2007), *aff'd,* 9 N.Y.3d 342, 849, 849 N.Y.S.2d 480, 880 N.E.2d 1 N.Y.S.3d 480 (2007). Indeed, both the Appellate Division and the Court of Appeals invoked this requirement in addressing Johnson's appeals from his conviction. *Johnson I,* 43 A.D.3d at 290, 842 N.Y.S.2d at 371; *Johnson IV,* 14 N.Y.3d at 919, 904 N.Y.S.2d at 692, 930 N.E.2d 765.[19] Thus, although, as we shall see, the New York courts have altered their definition of the elements of depraved-indifference-murder during the period of time when Johnson was facing charges and later when his appeals were pending, the legal framework by which the state appellate courts judged his sufficiency claim was that outlined in the trial court's unobjected-to jury instructions, which adhered to the law as defined in 2004.[20]

Although the federal courts have only occasionally referred to the question of how to reconcile this state-law rule with the general federal principle that evidentiary sufficiency is to be tested by the law as of the time when the conviction was finalized, *see, e.g., Bowman v. Ercole,* 2010 WL 6620879, at *20–22 (S.D.N.Y. Sept.1, 2010), *report and recommendation adopted,* 2011 WL 1419614 (S.D.N.Y. Apr.11, 2011), there appears to be a substantial basis for honoring the state-law rule. *See id.* at *20; *Parker v. Conway,* 2010 WL 1854079, at *3 (N.D.N.Y. May 7, 2010), *affd sub nom. Parker v. Ercole,* 666 F.3d 830 (2d Cir.2012). Such an outcome in a habeas proceeding is consistent with the general principle that the state courts are the conclusive source of definitions of the elements to be proven. In addition, the cited state-law principle can be viewed as, in effect, a rule of procedural waiver, *see Duggins v. Soitzer,* 2012 WL 4498522, at *7–8 (E.D.N.Y. Sept.28, 2012), and, as noted, the habeas court is bound to honor waiver rules absent the applicability of some federally-based exception.[21]

***23** The only question about the propriety of complying with this state rule on defining the elements of a crime when the jury charge is not challenged arises when the pertinent state caselaw on the substance of the crime has changed between the time of the trial and the completion of the appeal. *See generally Bowman,* 2010 WL 6620879 at *21 (discussing adequacy). The implicit argument for rejecting the state rule in that circumstance would be that futility can be a basis for cause if the petitioner can show a substantial and unanticipated change in the law post-trial. *See, e.g., Brown v. Ercole,* 2009 WL 857625, at *6 (S.D.N.Y. March 31, 2009), *rev'd,* 353 Fed. Appx. 518 (2d Cir.2009). But, as previously noted (*see supra* p. 48 n. 20), the Second Circuit has held that habeas petitioners whose trial, like Johnson's, took place after the New York Court of Appeals had decided Sanchez, *Hafeez,* and *Gonzalez,* cannot succeed in arguing futility premised on a claim that New York's subsequent change in the law governing depraved indifference was unforeseeable. *See Brown,* 353 F. App'x at 520; *Gutierrez,* 692 F.3d at 264. We therefore conduct our analysis in light of the law as defined by the jury instructions (and caselaw contemporaneous with those instructions) at the time of petitioner's trial in 2004.

a. *The Pertinent Evidence*

We first review the trial evidence pertinent to an assessment of the viability of the depraved-indifference murder conviction.

Tiffany Alexander, a friend of Johnson and Amir, testified that at about 5:00 p.m. on July 2, 1998, petitioner showed up in her building—located on East 102nd Street—with two other men. (Tr. 499–501). Appearing upset, he had a conversation with her, the details of which she did not recall other than her inquiry as to why he seemed upset, but at some point he asked if she had seen his brother Amir that day. (Tr. 499–503, 506, 509). Following this conversation, the three men, all of whom had bicycles, left the building and headed in the direction of First Avenue. (Tr. 509–11).

One of the two eyewitnesses to the shooting called by the prosecution—Pedro Menendez—testified that around 5:20 p.m. he was cleaning his car at the corner of 102nd Street and First Avenue, while keeping an eye on his two young children, who were playing on the sidewalk. (Tr. 227–29). According to Menendez, it was still daylight, and lighting conditions were "very clear." (Tr. 228–30, 271–72, 281). The witness recounted that at some point he saw Johnson slowly bicycling next to Amir as they proceeded south on First Avenue, When they reached 102nd Street, they crossed to the south side, where Menendez was standing, and the two brothers stood

there for about 15 minutes, talking and smoking together. (Tr. 242–43, 228–32, 271–75, 281, 284).

Eventually Amir walked east on 102nd Street, in the direction of the FDR Drive, while Johnson remained in place, straddling his bicycle. (Tr. 230–33). As Amir walked away, he and Johnson began to argue, with Johnson saying "Hey, look, remember you have to pay my money back," and Amir responded "I'm not going to pay you back." (Tr. 234). Amir then turned and headed back towards Johnson. As Menendez described the encounter, Amir was "coming on top" of Johnson, who, in response, dropped his bicycle and withdrew a revolver from his waistband. (*Id.*). Amir then began running east on 102nd Street. At that point, fearing for his children, Menendez called out "do not shoot, do not shoot," but Johnson pointed the revolver and fired a single shot over the children's heads while Amir was already about 30 feet away. (Tr. 235–37, 240–41, 266). Johnson then got back on his bicycle and headed north on First Avenue. (Tr. 241).

***24** A somewhat similar version was offered by a second eyewitness, Winston Nichols, who worked as a maintenance man in a nearby housing project. At about 5:30 p.m., he left work and heard the sounds of a loud argument on the corner of 102nd Street and First Avenue. (Tr. 375–81, 400). He went to investigate and saw Johnson straddling his bicycle and arguing with Amir. (Tr. 383). Just when the argument seemed to end, Amir "extended his hand" towards Johnson, at which point Johnson dropped his bicycle, pulled a firearm from his waistband and began to chase Amir. (Tr. 385–88, 393). He then heard what he described as "a big bang" and saw Amir "slide down," though he did not realize at the time that Amir had been shot. (Tr. 385, 388–89). Before Amir fell to the ground, Nichols saw him make a "throwing motion" with his arm and saw a knife land on the sidewalk. (Tr. 389–91).[22] He then saw Johnson head north on his bicycle. (Tr. 396).

The shot fired by Johnson was heard by Tiffany Alexander, some minutes after she had seen Johnson. She subsequently ran towards First Avenue, where she saw Amir leaning against a parked car. (Tr. 515–19). As she ran toward him, he collapsed onto the ground. She then held his hand as he tried to talk to her. (Tr. 520–21).[23]

As recounted by Ms. Lanette Ruiz—an ex-girlfriend of Johnson—shortly after 5:30 p.m. she found Johnson sitting outside her apartment door, red-eyed and holding his head in his hands. (Tr. 17, 181–82, 206, 209). When she asked what was wrong, he said "they were looking for him," and when she asked why, he said "I might have killed my brother." (Tr. 183, 219). She asked him to repeat himself and he did, saying "that he might have killed his brother." (Tr. 184). She told him to give himself up, and then, becoming frightened, she left the building, while Johnson remained inside. (Tr. 185).

The medical examiner testified that a single bullet had entered Amir's back near the left scapular region, perforated his lung and heart, and exited the left front of his body. (Tr. 77). She reported that the wound did not show any gunpowder or dirt, indicating that the victim was not shot at point-blank range. (Tr. 80).

b. *The Statutory Standards for Depraved–Indifference Murder*

Section 125.25(2) of the New York Penal Law provides the elements of depraved-indifference murder. The State has to demonstrate, beyond a reasonable doubt, that "under circumstances evincing a depraved indifference to human life, [the defendant] recklessly engage[d] in conduct which create[d] a grave risk of death to another person, and thereby cause [d] the death of another person." Penal Law § 125.25(2). A person acts recklessly when

> he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

***25** Penal Law § 15.05(3).

As early as 1983, the New York Court of Appeals addressed this provision and distinguished its intent element from the definition of intentional murder, which it noted was predicated on a subjective test, that is, whether the defendant intended to kill. In contrast, the Court observed, "the focus of the [depraved indifference murder] offense is not upon the subjective intent of the defendant ... but rather upon an objective assessment of the degree of risk presented by defendant's reckless conduct." *People v. Register,* 60 N.Y.2d 270, 277, 469 N.Y.S.2d 599, 602, 457 N.E.2d 704 (1983), *overruled by Feinaold,* 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163.

This focus on an objective test was not explicitly overruled until 2006, in *Feingold.* As summarized recently by the Second Circuit, however, through intervening decisions in the

period between 2002 and 2005, the Court of Appeals began to "move away" from the intensive reliance on objective criteria. *Gutierrez,* 702 F.3d at 108. The first decision of note in this process was *Sanchez,* 98 N.Y.2d 373, 748 N.Y.S.2d 312, 777 N.E.2d 204, in which a 4–3 majority reiterated the *Register* holding that "the requirement of depraved indifference ... focuses not on the subjective intent of the defendant, 'but rather upon an objective assessment of the degree of risk presented by defendant's reckless conduct." *Sanchez,* 98 N.Y.2d at 379–80, 748 N.Y.S.2d at 316, 777 N.E.2d 204 (quoting *Register,* 60 N.Y.2d at 277, 469 N.Y.S.2d at 602, 457 N.E.2d 704). At least one of the three dissenters would have overruled *Register* and treated depraved indifference as a subjective standard, to avoid the potential risk that this version of murder might be used by prosecutors as "a proxy" for intentional murder. *Id.* at 394–415, 469 N.Y.S.2d 599, 457 N.E.2d 704, 748 N.Y.S.2d at 326–42, 777 N.E.2d 204 (Rosenblatt, J., dissenting).

Subsequently, four cases decided between 2003 and 2005 "moved New York law away from the holding in *Register," Gutierrez,* 702 F.3d at 109, but did so without explicitly overruling that decision. *See Hafeez,* 100 N.Y.2d 253, 762 N.Y.S.2d 572, 792 N.E.2d 1060; *Gonzalez,* 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273; *People v. Pavne,* 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 634 (2004); *People v. Suarez,* 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721 (2005). These decisions emphasized that if the defendant intended to kill someone, he could not be said to harbor a mental state of depraved indifference, thus precluding his conviction for depraved-indifference murder. *See, e.g., Gonzalez,* 1 N.Y.3d at 467–68, 775 N.Y.2d at 226–28 ("a person cannot act both intentionally and recklessly with respect to the same result" and therefore if "a defendant's conduct is specifically designed to cause the death of the victim, it simply cannot be said that the defendant is indifferent to the consequence of his or her conduct."); *Payne,* 3 N.Y.3d at 271–72, 786 N.Y.S.2d at 636) ("point blank shooting" which was "directed at a single individual" cannot be found to be "reckless"). They also began to suggest, with increasing clarity, that the statutory requirement of depravity imposed an additional, potentially subjective, test. These decisions, particularly *Gonzalez, Payne* and *Suarez,* also provided some indication of the factual circumstances in which a jury could justifiably find "reckless conduct" that would qualify as potentially depraved. *See Gutierrez,* 702 F.3d at 114.

***26** In *Gonzalez*—decided shortly before Johnson's trial—the Court explained that "depraved indifference murder differs from intentional murder in that it results not from a specific, conscious intent to cause death, but from an indifference to or disregard of the risks attending defendant's conduct." *Gonzalez,* 1 N.Y.3d at 467, 775 N.Y.S.2d at 226, 807 N.E.2d 273. The Court repeatedly emphasized the nature of a defendant's mind-set when acting with a depraved indifference to human life as one that is "unconcerned with the consequences," "indifferent to whether death will likely result from his conduct," and that lacks "a conscious objective to cause death, but instead is recklessly indifferent, or depravedly so, to whether death occurs." *Id.* at 467–68, 775 N.Y.S.2d at 227, 807 N.E.2d 273. The Court also pointed out that "presenting a heightened risk of unintended injury" is a circumstance establishing the required intent for depraved-indifference murder. *Id.* at 468, 775 N.Y.S.2d at 227, 807 N.E.2d 273. It then concluded that the evidence in that case—which showed that Gonzalez had shot ten times at his victim from close range, firing even as the man lay prone on the ground—was consistent only with an intent to kill. *Id.* at 467, 775 N.Y.S.2d at 226, 807 N.E.2d 273.

In *Payne,* which postdated petitioner's trial by a few months, the Court reaffirmed the analysis in *Gonzalez* and noted that "the use of a weapon can never result in depraved indifference murder when ... There is a manifest intent to kill." *Payne* 3 N.Y.3d at 271, 786 N.Y.S.2d at 118, 819 N.E.2d 634. As for the intent required to trigger exposure to criminal liability for depraved-indifference murder, the Court held that recklessness is not enough, reaffirming its earlier statement in *Gonzalez* that

> the reckless conduct must be so wanton, so deficient in a moral sense of concern, so devoid of regard for the life or lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes upon a person who intentionally causes the death of another.

Id. at 271, 786 N.Y.S.2d 116, 819 N.E.2d 634, 786 N.Y.S.2d at 118, 819 N.E.2d 634 (quoting *Gonzalez,* 1 N.Y.3d at 469, 775 *N.Y.S.2d* at 227, 807 N.E.2d 273). The *Payne* Court further differentiated the case before it—in which the evidence of a point-blank shooting pointed solely to an intentional killing—from homicides in which "a defendant lacking the intent to kill (but oblivious to the consequences and with depraved indifference to human life) shoots into a crowd or otherwise endangers innocent bystanders." *Id.* at 271, 786 N.Y.S.2d at 118, 819 N.E.2d 634. The Court also recognized another species of depraved-indifference murder, in which "acts of the defendant are directed against a particular victim but are

marked by uncommon brutality—coupled not with an intent to kill ... but with depraved indifference to the victim's plight." *Id.*

As for *Suarez,* decided the next year, that case involved two separately prosecuted defendants—one of whom had stabbed his girlfriend in the throat, chest and abdomen, and had then fled, and the other of whom had quickly pulled a knife from her purse in the midst of a physical altercation and had stabbed her victim in the stomach—both sets of circumstances that the Court held did not reflect "depraved indifference to [the victms'] fate." 6 N.Y.3d at 217, 811 N.Y.S.2d at 278, 844 N.E.2d 721. The Court noted that there was a narrow range of circumstances in which a defendant who killed another person in a one-on-one encounter that did not endanger anyone else could be found guilty of depraved-indifference murder, *id.* at 212, 811 N.Y.S.2d at 275, 844 N.E.2d 721, offered some specific qualifying circumstances, and then added a vaguely worded category of "extraordinary cases involving conduct that endangered only one person, where the evidence showed not just recklessness, but depraved indifference to human life." 6 N.Y.3d at 213, 811 N.Y.S.2d at 275, 844 N.E.2d 721.[24]

***27** Finally, in 2006, in *Feingold,* the Court of Appeals expressly overruled *Register* and *Sanchez.* Thus, it held that depraved indifference referred to the defendant's mental state and not to the nature of his conduct. *Feingold,* 7 N.Y.3d at 294–97, 819 N.Y.S.2d at 695–97, 852 N.E.2d 1163.

In general terms, this survey reflects that at the time of petitioner's trial the definition of the elements of depraved-indifference murder was in flux, but the caselaw suggested (1) that the charge could not be sustained if the proof manifestly demonstrated an intention to kill, and (2) that an absence of a specific intent to kill could justify conviction on this charge if the defendant's conduct reflected indifference to whether the victim died, and if he acted in a manner that was sufficiently reckless or devoid of common morality as to justify finding his action to be the equivalent of intentional murder. As we will see, the jury instructions at Johnson's trial followed this general outline, as, indeed, the Appellate Division later found.

c. *The Jury Instructions at Johnson's Trial*

At the tail end of the trial court's disquisition on intentional murder, it noted the distinction between that charge and depraved-indifference murder, observing that the underlying theory of the second count was "that under circumstances evincing a depraved indifference to human life, defendant recklessly caused the death of Amir Johnson." (Tr. 713–14). It went on to state that these two counts were irreconcilable, since one who intends to kill "cannot at the same time act recklessly, that is, with a conscious disregard of a substantial risk that death would result." (Tr. 714).

After reading count 2 and the depraved-indifference statute to the jury, the judge went on to offer further explanation of the elements of that crime. In doing so, it made clear to the jury that, apart from the requirement of an indifference to the fatal consequence of the conduct (as distinguished from an intent to cause death)—in itself a subjective inquiry—the analysis must focus on the nature of the conduct to assess whether the defendant had acted with the requisite degree of recklessness (or depravity), an inquiry that required an objective assessment. Thus, Justice White first noted the "distinguishing feature of this crime," which she characterized as "recklessly creating a grave risk of death to another under circumstances evincing a depraved indifference to human life." (Tr. 715–16). She then described the recklessness element: "A person recklessly creates a grave risk of death to another when he is aware of and consciously disregards a substantial and unjustifiable risk that a grave risk of death will result." (Tr. 716). In turn, she explained, quoting the statute, "[t]he risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in [the] situation." (*Id.*).

***28** As for the depravity element—that is, "a depraved indifference to human life"—the court advised that the conduct must be "more serious and blameworthy than conduct which is merely reckless. It's the element of depravity which raises the degree of the crime to murder in the second degree and which the law considers as blameworthy as intentional murder." (Tr. 716–17). In further explanation, Justice White observed:

> A person acts with depraved indifference to human life when in the judgment of the jury his conduct, beyond being reckless, is so wanton, is so deficient in the moral sense and concern, so devoid of regard for life, the lives of others, and so blameworthy as to warrant the same criminal liability as that which the law imposes on a person who intentionally causes the death of another.

(Tr. 717).

Finally, the court summarized the six elements that the State had to prove to sustain the charge. These findings included: (1) that Johnson had "engaged in conduct that created a grave

risk of deatxi to anotrier;" (2) that at tine t ime, Johnson "was aware of the substantial and unjustifiable risk that a grave risk of death would result;" (3) that Johnson "consciously dis[reg]arded the substantial and unjustifiable risk that a grave risk of death would result;" (4) that "defendant's conscious disregard of this risk constituted a gross deviation from the standard of conduct a reasonable person would observe in this situation"; (5) that Johnson "so acted under circumstances evincing a depraved indifference to human life;" and (6) that his actions caused the death of Amir. (Tr. 717–18). In addition, in addressing the fifth element, the court observed that the jury must decide whether "the circumstances surrounding the defendant's [allegedly] reckless conduct was so brutal, so callo[u]s and extremely dangerous and inhumane as to demonstrate an attitude of total and utter disregard for the life of the endangered person, and, therefore, so blameworthy as to warrant the imposition of the same criminal liability as that which the law imposes on a person who intentionally causes the death of another." (Tr. 718).

During jury deliberations, the jurors requested a read-back or further explanation, *inter alia,* of the difference between intentional murder and depraved-indifference murder. The judge then reiterated her prior instructions, which apparenlty satisfied the jury. (Tr. 737–48).

(d). *Assessment of the Adequacy of the Evidence Based on the Jury Charge*

As we have noted, under New York law the determination of the sufficiency of the evidence must be based on the elements of the crime as embodied in the trial court's unobjected-to jury instructions, and that limitation is properly enforced in a federal habeas proceeding. *See Bowman,* 2010 WL 6620879, at *20; *Parker,* 2010 WL 1854079, at * 3. With that analytical framework, it is evident that petitioner would not be entitled to relief on his sufficiency claim even if his attorney had preserved the claim for habeas review.

***29** As noted in the instructions at Johnson's trial, the State was obliged to demonstrate (1) that he had acted with indifference to the fate of the victim (as distinguished from intending to kill him) and (2) that his conduct was so heinous as to reflect depravity. For our purposes, we must decide only whether the jurors could have made both findings in view of the evidence before them, and we conclude that a reasonable juror could have so found.

It is true that a trier of fact could certainly have inferred that Johnson had intended to kill his brother, since he first argued with Amir and then appeared to fire deliberately as his sibling fled. (Tr. 236–37). This does not mean, however, that a jury could not find, alternatively, that petitioner acted with depraved indifference, rather than an intent to kill, and that his conduct reflected "a gross deviation from the standard of conduct that a reasonable person would observe in the situation." N.Y, Penal Law § 15,05(3).

First, in contrast to the circumstances described in *Gonzalez* and *Payne,* petitioner here fired only one shot, and did so from a considerable distance, estimated by Mr. Menendez at 30 feet, and that shot apparently did not kill Amir outright.[25] (Tr. 315–17, 518–21). These circumstances permit, even though they do not compel, an inference that the shooter did not intend to kill.

Second, the victim was the shooter's own brother. This circumstance, while particularly horrific, may also be weighed by a trier of fact as counseling some doubt as to whether Johnson truly intended to kill Amir.

Third, just before the shooting, witnesses reported that Johnson and his brother had been engaged in a seemingly amicable get-together while smoking "a blunt." It was only as Amir departed that they seemed to argue, as Johnson demanded that Amir repay a debt and Amir announced that he would not repay the money that he apparently owed his brother. (Tr. 234). Amir then apparently approached Johnson and seemingly threatened him—possibly with a knife—leading Johnson to take out a firearm and shoot at Amir, although at a considerable distance as he was running away. (Tr. 234, 236–41). Again, this sequence could suggest to a trier of fact that Johnson was acting out of a sudden angry impulse but without having formed an intent to kill.[26]

Fourth, in light of the testimony suggesting that petitioner had been smoking marijuana prior to shooting his brother, "in addition to the well-accepted principle of New York penal law that voluntary intoxication can negate the *mens rea* of intent but not recklessness ... we cannot say that no rational juror could have found beyond a reasonable doubt that [petitioner] acted unintentionally." *Policano v. Herbert,* 507 F.3d 111, 116–17 (2d Cir.2007).

Fifth, according to still another witness, Ms. Lanette Ruiz, following the shooting Johnson sought her out and exclaimed, in apparently great emotional distress, that "I might have killed my brother." (Tr. 182–84, 219). Again, this remark and his apparent state of mind could be viewed as reflecting a lack

of a "conscious objective to cause death." *Gonzalez,* 1 N.Y.3d at 467–68, 775 N.Y.S.2d at 227, 807 N.E.2d 273.

***30** Sixth, insofar as the State had to show depravity—that is, a blatant disregard for life or willingness to endanger the public or other sufficiently heinous conduct—the evidence was, again, sufficient to permit a trier of fact to make the necessary findings. The shooting took place in broad daylight, on the street, with a number of people in the vicinity. (Tr. 229–30). This factual setting presents the kind of heightened risk of unintended injury, identified in *Sanchez* and *Gonzalez,* that is indicative of a depraved-indifference murder. Because of the presence in the street of people other than the victim, including children playing on the sidewalk when petitioner fired at Amir, the jurors were certainly permitted to find that Johnson had seriously endangered innocent bystanders—a substantial and unjustifiable risk that petitioner had to consciously disregard—and one that *Payne* identified as a circumstance consistent with depraved-indifference murder.[27] *Payne,* 3 N.Y.3d at 271, 786 N.Y.S.2d at 118, 819 N.E.2d 634. Indeed, this risk to others was underscored by the testimony of Mr. Menendez, who reported that the shooting had taken place over the heads of his two children as he pleaded with Johnson not to shoot. (Tr. 236–37, 241).

Finally, on the issue of depravity, we note again that the victim of Johnson's shooting was his own brother. Although the New York courts have not clearly determined whether the family —or other status of the victim or bystanders is pertinent to the depravity analysis, it is fair to infer that a jury could take that circumstance into consideration as well, not only with respect to intent to kill, but also in assessing the level of "callous [ness]," brutality or inhumanity exhibited by the defendant. Indeed, the Appellate Division in Johnson's case appeared to adopt this view, mentioning—when discussing depravity—the sibling relationship. *Johnson III,* 67 A.D.3d at 455, 891 N.Y.S.2d at 312 ("That defendant shot his own brother surely is a fact the jury reasonably could have viewed as highly significant in making the moral judgment it was instructed to make.").

In sum, given the full range of testimony about the fatal encounter between Johnson and his brother Amir, reasonable jurors, if instructed by the court in the terms used by Johnson's trial judge, could plausibly have found that Johnson had acted with the requisite *mens rea* for depraved-indifference murder in that (1) they had not been shown, beyond a reasonable doubt, that he had intended to kill his victim, and (2) he had acted in such a grossly depraved manner as to justify a conviction on this version of second-degree murder.

Thus, petitioner's sufficiency claim is meritless. Moreover, this conclusion also justifies the invocation of a procedural bar. As noted, Johnson seeks to avoid the bar by invoking ineffective assistance as cause, but even if Johnson's attorney had preserved the sufficiency claim at trial, petitioner would have lost on in a habeas proceeding, thus precluding him from showing that his trial attorney's error caused him cognizable prejudice. *See Mayo v. Henderson,* 13 F.3d 528, 534 (2d Cir.1994).[28]

***31** We also note that even if petitioner's trial counsel had objected to the jury charge and if, consequently, we were permitted to apply the *Feingold* standard in effect in 2010, when petitioner's conviction became final, the outcome would be no different. This is because under the legal standard articulated in *Feingold,* circumstantial evidence of depraved indifference may be used to prove the subjective mental state of depravity. *See Feingold,* 7 N.Y.3d at 295–96, 819 N.Y.S.2d at 696, 852 N.E.2d 1163; *People v. Campbell,* 33 A.D.3d 716, 717–19, 826 N.Y.S.2d 267, 269–71 (2d Dep't 2006); *Lyons v. LaClaire,* 2013 WL 842711, at *7 (S.D.N.Y. Mar.6, 2013). Thus, the same analysis of the circumstantial evidence that we applied in assessing the sufficiency of the evidence under the objective legal standard that was set forth in the jury charge could equally support a conclusion that petitioner had acted with the requisite subjective mental state under the subjective legal standard that was in effect in 2010.[29]

This conclusion is in no way undermined by the Court of Appeals's observation that "a typical 'one-on-one shooting ... can almost never qualify as depraved,' " *People v. Martinez,* 20 N.Y.3d 971, 979, 959 N.Y.S.2d 674, 679, 983 N.E.2d 751 (2012) (citing *Payne,* 3 N.Y.3d at 272 n. 2, 786 N.Y.S.2d at 119 n. 2, 819 N.E.2d 634), for it is apparent that—given the ambiguity as to petitioner's intent to kill, the distance between petitioner and his victim at the time the shot was fired, as well as the fact that he fired the gun in public, over the heads of young children—petitioner's case falls within the limited category of one-on-one shooting murders that New York courts continue to regard as depraved. *Compare Campbell,* 33 A.D.3d at 717–19, 826 N.Y.S.2d at 269–71 (depraved-indifference conviction upheld where defendant fired shots at three men, fatally striking one, as they fled a seemingly hostile encounter with him) *and People v. Timmons,* 78 A.D.3d 1241, 1243, 910 N.Y.S.2d 290, 293 (3d Dep't 2010) (depraved-indifference conviction upheld where defendant

fired shot on a crowded street) *with* *People v. Jean–Baptiste,* 11 N.Y.3d 539, 541, 872 N.Y.S.2d 701, 702, 901 N.E.2d 192 (2008) (overturning depraved-indifference conviction where defendant was within 12 to 18 inches of victim, pulled the trigger twice with no shot fired, then pulled the trigger a third time, discharging a round into victim's chest) *and* *Policano v. Herbert,* 7 N.Y.,3d 588, 601, 825 N.Y.S.2d 678, 687–88 (2006) (holding that depraved-indifference conviction could not stand under state law as of 2006, where defendant shot victim twice in the head, once in the neck and once in the thigh, from about three to five feet away); *accord* *Johnson v. Bellnier,* 2013 WL 276075, at *3 (defendant "fired a gun approximately ten times down a street in the dark at a fleeing victim ... A reasonable jury could have concluded that Johnson's actions illustrated depraved indifference not only to Chandler, but also to any other people on the street that could have been struck by his bullets."). The circumstances of Johnson's encounter with his brother plainly would suffice to permit a reasonable juror to find that petitioner acted with "an utter disregard for the value of human life—a willingness to act not because [he] intend[ed] harm, but because [he] simply d[id]n't care whether grievous harm result[ed] or not." *Feingold,* 7 N.Y.3d at 296, 819 N.Y.S.2d at 697, 852 N.E.2d 1163 (quoting *Suarez,* 6 N.Y.3d at 214, 811 N.Y.S.2d at 276, 844 N.E.2d 721).

IV. *The Ineffective–Counsel Claim*

***32** As noted, petitioner's memorandum of law briefly mentions that even if his evidentiary-sufficiency claim was procedurally waived in state court, his trial attorney denied him effective representation by failing to preserve the claim. (Pet'r Mem. 24). Although this reference might be viewed as intended only as a cause-and-prejudice argument intended to save the evidentiary-sufficiency claim, it could also be read as an attempt to assert an independent Sixth Amendment claim.

To assess a Sixth Amendment violation, the Supreme Court has established a two-part test: (1) counsel's performance must be shown to have been deficient, and (2) that deficiency must be shown to have prejudiced the defendant. *See* *Lafler v. Cooper,* —— U.S. ——, ——, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012); *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The performance prong requires that a defendant show "that counsel's representation fell below an objective standard of reasonableness" and that the attorney committed "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Harrington,* 131 S.Ct. at 787–88 (quoting *Strickland,* 466 U.S. at 687). To satisfy the second prong, a defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler,* 132 S.Ct. at 1384 (quoting *Strickland,* 466 U.S. at 694). In this case, petitioner is unable to demonstrate either that trial counsel was objectively unreasonable or that the lawyer's errors caused petitioner prejudice.

Defense counsel performed well in all phases of the trial despite the strength of the State's case, including putting on a meaningful alibi defense, and obtaining an acquittal on the intentional-murder charge. In light of his overall performance at trial, the attorney's failure to preserve an objection to the sufficiency of the evidence on the depraved-indifference count—though concededly an error by the lawyer—did not represent such a gross professional failing as to trigger potential Sixth Amendment relief. *See, e.g.,* *Fore v. Ercole,* 594 F.Supp.2d 281, 302 (E.D.N.Y.2009); *Gaskin v. Graham,* 2009 WL 5214498, at *13 (E.D.N.Y. Dec.30, 2009).

In addition, as discussed above in the context of our procedural-bar analysis, the petitioner is unable to show that his counsel's errors prejudiced him—that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"[30] *Lafler,* 132 S.Ct. at 1384 (quoting *Strickland,* 466 U.S. at 694)—for the sufficiency claim is ultimately meritless.

CONCLUSION

For the reasons stated, we recommend that the writ be denied and the petition dismissed. In view of possibly colorable arguments about (1) the independence of the Appellate Division's procedural waiver decision, (2) the adequacy, in this context, of the state rule governing sufficiency challenges when the jury charge is unchallenged, and (3) the status of the depraved-indifference-murder elements in 2004 and 2010, we believe that a cerificate of appeal should issue, but solely with respect to petitioner's evidentiary-sufficiency claim.

***33** Pursuant to Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable William H. Pauley, Room 2210, 500 Pearl Street, New

York, New York 10007–1312 and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York 10007–1312. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Thomas v. Arn,* 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), *reh'g denied,* 474 U.S. 1111, 106 S.Ct. 899, 88 L.Ed.2d 933 (1986); *Small v. Sec'y of Health and Human Services,* 892 F.2d 15, 16 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

All Citations

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Footnotes

1 Johnson's objections to the Report state that his habeas petition also raised the arguments from his pro se brief before the Appellate Division. However, no argument related to these claims appears in the Petition or its supporting memorandum of law. Even if they had been included, the petition would be denied as to these claims because they were not raised in the Court of Appeals on direct appeal as Johnson admits, nor are the alternative requirements of 28 U.S.C. § 2254(b)(1) satisfied.

1 Petitioner also asserts at the end of his memorandum of law that the murder conviction was against the weight of the evidence (*id.* at 24–25), but this is not a claim of federal-law dimension and, thus, may not be considered in a habeas proceeding. *See, e.g., Maldonado v. Scully,* 86 F.3d 32, 35 (2d Cir.1996); *Faria v. Perez,* 2012 WL 3800826, at *13 n. 7 (E.D.N.Y. Sept.2, 2012).

2 In a sequential and double-blind format, the lineup is conducted by a law-enforcement representative who has had no involvement in the investigation of the crime, and the suspect and fillers are shown to the witness one at a time rather than being displayed together, as in a traditional lineup. *See, e.g., People v. Gonzalez,* 2004 WL 2059699, at *1 n. 1 (Sup.Ct. Bronx Cnty. Sept. 14, 2004).

3 The transcript refers to this witness as Melendez, but his real name was Menendez. (Resp't App. Ex. C at 5 n. 2).

4 The State premised this argument on the fact that, at the conclusion of the presentation of evidence, defense counsel had argued in brief terms for dismissal for lack of proof that Johnson was the shooter and had then referred in passing to a lack of proof of the necessary intent for either version of the murder charge but had offered no explanation of his assertion regarding the intent needed to establish depraved-indifference murder. (Resp't App. Ex. C at 19–24).

5 Two justices dissented. *Johnson I,* 43 A.D.3d at 294, 842 N.Y.S.2d at 374.

6 Respondent's counsel has not proffered a copy of Johnson's first application for leave to appeal, reporting that she cannot locate it. From the State's opposition to Johnson's leave request we glean that he sought leave to appeal the denial of "interest of justice" jurisdiction to review the "weight of the evidence" claim. (*See* Sept, 7, 2007 letter to the Hon. Richard T. Andrias from Ass't Dist. Att'y Susan Gliner).

7 The dissent reiterated its previously expressed view that the conviction was against the weight of the evidence because Johnson's conduct "was not marked by uncommon brutality" and did not evince the mental culpability required for deliberate-indifference murder. *Johnson III,* 67 A.D.3d at 461, 891 N.Y.S.2d at 317. On the latter point the dissenters opined that a "one-on-one shooting or knifing can never, with rare exceptions, qualify as deliberate indifference murder." *Id.*

8 Consistent with the prison-mailbox rule, *see, e.g., Noble v. Kelly,* 246 F.3d 93, 97 (2d Cir.2001), we date the filing based on the date that appears in Johnson's papers. Although the form petition is undated, his accompanying memorandum of law is dated April 22, 2011. (Pet'r Mem. 25).

9 At trial the court offered the jury alternatives of first-and second-degree manslaughter as lesser-included offenses. (Tr. 719–23).

10 Indeed, in Johnson's reply affidavit, he concedes that there is no federal basis for the claim and says that the claim is "abandoned." (Pet'r Reply 20). We address the matter nonetheless because the pertinent heading on this portion of his *pro se* reply papers appears to reassert his claim, thus leaving a potential ambiguity as to his position on this issue.

11 The Supreme Court applies the term "identification testimony" to both recountings of pre-trial identifications and in-court identifications of the defendant by a witness. *See Foster,* 394 at 445.

12 According to *Biggers,* a court should consider the following factors when evaluating the independent reliability of an identification procedure: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty expressed by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. 409 U.S. at 200–01; *accord Manson,* 432 U.S. at 114.

13 This type of lineup is occasionally used by the police. *Compare, e.g., People v. Reynoso,* 2012 WL 7749158, at *2–3 (Sup.Ct. Bronx Cty. Sept. 24, 2012) (ordering double-blind lineup), *with In re Walthour,* 2008 WL 623034, at *2–3 (Sup.Ct. Kings Cty. March 5, 2008) (denying request for sequential, double-blind lineup).

14 Because the state court did not contradict or unreasonably apply Supreme Court precedent on the "unduly suggestive" issue, there is no need to address independent indicia of the identification's reliability. *See, e.g., United States v. Maldonado–Rivera,* 922 F.2d 934, 973 (2d Cir.1990). In any event, given the testimony of the two prosecution eyewitnesses—establishing that they saw the shooter close up in broad daylight, that they saw him for an extended period, that they had ample reason to pay close attention in view of the altercation, and that they both identified Johnson quickly and without hesitation (Tr. 246–47, 390–91)—there would be no basis for suggesting that their identifications of Johnson were not independently reliable.

15 The panel offered a somewhat more extended discussion of the interest-of-justice exception when referring to Johnson's "weight of the evidence" argument. *Johnson I,* 43 A.D.3d at 292–293, 842 N.Y.S.2d at 372–74.

16 We note that although the majority concluded that there was no basis for invoking the interest-of-justice exception to Johnson's "weight of the evidence" argument, *Johnson I,* 43 A.D.3d at 291–93, 842 N.Y.S.2d at 372–74, Johnson obtained leave to appeal and briefed the "weight of the evidence" issue for the Court of Appeals (*see* Resp't App. Ex. F at 44–60), which in turn treated that claim as preserved for purposes of review. *Johnson* II, 10 N.Y.3d at 877–78, 860 N.Y.S.2d at 764, 890 N.E.2d 877. We attribute this to the fact that the basis for Court of Appeals review was presumably triggered by the dissent of two of the Appellate Division justices, who argued that interest-of-justice review was appropriate on the "weight of the evidence" question. *Johnson I,* 43 A.D.3d at 294–97, 842 N.Y.S.2d at 374–77; *see* N.Y.C.P.L.R. § 5601(a) (McKinney 1986) ("An appeal may be taken to the court of appeals as of right ... from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.").

17 Johnson cites *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), for the proposition that "an unreasonable application of the facts will be deemed sufficient to remove [a] bar to review of claims." (Pet'r Reply 16). This is incorrect. *Wiggins* did not involve any issue of procedural bar, but rather dealt directly with the merits of the petitioner's Sixth Amendment claim. *Wiggins,* 539 U.S. at 534.

18 In this case, Johnson's counsel asserted on his direct appeal that the Appellate Division should review the sufficiency claim in the interest of justice and alternatively argued that the failure of trial counsel to preserve the claim amounted to ineffective assistance of counsel, thus also justifying appellate review. (Resp't App. Ex. A at 28–29). Then, in the Court of Appeals he reiterated, albeit in a footnote, his Sixth Amendment contention that the failure of the trial attorney to preserve the claim amounted to ineffective assistance of counsel. (Resp't App. Ex. F at 60 n. 10). Johnson also invoked the Sixth Amendment guarantee of effective trial representation in his *pro se* brief to the Appellate Division, but his criticisms of counsel did not involve the trial attorney's failure to preserve the sufficiency argument. (Resp't App. Ex. B at 28–34). While it is by no means clear that Johnson's presentation of the issue to the New York courts constituted an "independent claim," as required under *Edwards,* 529 U.S. at 452 (quoting *Murray,* 477 U.S. at 489), or that he exhausted the claim, *see, e.g., People v. Brown,* 45 N.Y.2d 852, 853, 410 N.Y.S.2d 287, 287, 382 N.E.2d 1149 (1978) (usually ineffectiveness

of counsel is not demonstrable on main trial record), we assume for present purposes that Johnson has satisfied the procedural prerequisites for asserting his Sixth Amendment theory.

19 The Appellate Division confirmed that Justice White's instructions (apart from having been acquiesced to by defense counsel) properly summarized the state of the law at the time. *Johnson I,* 43 A.D.3d at 290, 842 N.Y.S.2d at 372; *see* pp. 62–65, *infra* (summarizing jury charge).

20 Petitioner could have conceivably formulated an alternative cause argument premised on the alleged futility of a sufficiency argument at the time of petitioner's trial, since the Court of Appeals had not yet explicitly overturned its prior interpretation of depraved-indifference murder until 2006, in *People v. Feincrold,* 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163 (2006). *See Gutierrez v. Smith,* 702 F.3d 103, 112 (2d Cir.2012) (finding cause based on shift in law of depraved-indifference murder following the petitioner's 2001 trial). However, the Second Circuit rejected the same argument in *Brown v. Ercole,* 353 F. App'x 518, 520 (2d Cir.2009), where the petitioner's trial had been held, as in this case, after the New York Court of Appeal's decisions in *People v. Sanchez,* 98 N.Y.2d 373, 748 N.Y.S.2d 312, 777 N.E.2d 204 (2002), *overruled by Feingold,* 7 N.Y.3d 288, 819 N.Y.S.2d 691, 852 N.E.2d 1163, *People v. Hafeez,* 100 N.Y.2d 253, 762 N.Y.S.2d 572, 792 N.E.2d 1060 (2003), and *People v. Gonzalez,* 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273 (2004). As the circuit court has explained, counsel in such circumstances "were on notice that the law was no longer static and that counsel could reasonably have argued that the evidence presented by the state in their cases was legally insufficient to support a conviction for depraved indifference." *Gutierrez v. Smith,* 692 F.3d 256, 264 (2d Cir.2012), *superceded by* 702 P.3d 103 (2d Cir.2012). Accordingly, petitioner would be unable to surmount the procedural bar by alleging that his counsel's failure to preserve a legal-sufficiency claim was justified by the purported futility of such an argument at the time of petitioner's trial. *See Bousley,* 523 U.S. at 623 ("futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court, at that particular time").

21 We are unable to conceive of any reason not to honor this rule, which both the Appellate Division and Court of Appeals followed in assessing Johnson's sufficiency and "weight of the evidence" claims. Johnson never argued in state court that his trial attorney's acquiescence to the jury instructions on depraved-indifference murder constituted ineffective assistance, and he does not do so here, nor does he challenge the jury charge itself in this forum. There is also no apparent reason why such an unarticulated claim should be addressed here to avoid a fundamental miscarriage of justice. *Compare Duggins,* 2012 WL 4498522, at *7–8 (declining to apply *Dekle* rule because state courts had not relied on it).

22 The police later recovered a knife in that location. (Tr. 24–25, 52, 118–19, 148).

23 By the time that a police officer came on the scene, Amir appeared to have died, although he was not pronounced dead until he was examined at Metropolitan Hospital. (Tr. 21–22, 475–76).

24 The *Suarez* Court cited a case that had referred to "Polish Roulette" as one example, but *Suarez* did not otherwise offer any definition of this category. 6 N.Y.3d at 213, 811 N.Y.S.2d at 275, 844 N.E.2d 721 (citing *People v. Roe,* 74 N.Y.2d 20, 544 N.Y.S.2d 297, 542 N.E.2d 610 (1989)).

25 The medical testimony referred to a single bullet, which penetrated one lung and the heart and exited from the chest. (Tr. 77).

26 In this regard, we note that Mr. Menendez testified that during the argument Amir had so closely approached Johnson as to be seeking to get on top of him. (Tr. 235). It was apparently at this point that Johnson took out a gun. Despite this apparent face-to-face encounter, Menendez estimated that Amir was about 30 feet away when Johnson fired at him (Tr. 266), suggesting that petitioner had hesitated before firing, a further circumstance that the jurors could have taken as an indication that he had not intended to kill his brother.

27 At first blush, it is not clear why the danger to people other than the arguably intended victim should make a difference if the shooter clearly intended to kill the victim and did so. It bears noting, however, that the Court in *Payne* (and previously in *Hafeez,* 100 N.Y.2d at 259, 762 N.Y.S.2d at 575, 792 N.E.2d 1060) seemed to suggest as much in distinguishing the Court's earlier decision in *Sanchez,* in which the defendant had fired at close range at a clearly intended victim and killed him. Both *Payne* and *Hafeez* suggested that the result in *Sanchez* turned on the fact that it involved the sudden shooting of a victim by a defendant who reached around from behind a door and fired into an area where children were playing,

presenting a heightened risk of injury. *See Hafeez,* 100 N.Y.2d at 259, 762 N.Y.S.2d at 575, 792 N.E.2d 1060; *see also Payne,* 3 N.Y.3d at 271, 786 N.Y.S.2d at 118, 819 N.E.2d 634.

It bears emphasis that the Court in *Sanchez* found other reasons to question whether the defendant intended to kill the victim, rather than wounding him, even though he shot at him at close quarters. We therefore infer that the danger to others cited by the Court of Appeals in *Hafeez* and *Payne* could have been intended to address the independent element of wanton recklessness.

28 Even if we were in doubt as to the sufficiency of the evidence and were to find that petitioner had satisfied the cause-and-prejudice exception to procedural bar, we certainly could not say, in reaching the merits of his claim, that the Appellate Division's decision on sufficiency was contrary to, or unreasonably applied, settled Supreme Court precedent. Thus, even in the absence of a procedural bar, he would not be entitled to issuance of a writ of habeas corpus on the sufficiency claim.

29 Indeed, our circuit court has recently made the point that the decisions of the New York Court of Appeals that are pertinent to an understanding of the state of law in the *Feingold* era—including the decisions that predated *Feingold*—do not establish a rigid set of rules; rather, "the New York Court of Appeals has begun to use the depraved indifference murder cases to provide guidance *on how to read facts* as indicative of mental status." *Gutierrez,* 702 F.3d at 118 (emphasis in original).

30 "A reasonable probability is one sufficient to undermine confidence in the outcome of the trial or appeal." *Aparicio,* 269 F.3d at 95 (citing *Strickland,* 466 U.S. at 694).

955 F.2d 178
United States Court of Appeals,
Second Circuit.

Donald JOHNSON, Petitioner–Appellant,

v.

Bart ROSS, Superintendent, Arthur Kill Correctional Facility, Respondent–Appellee.

No. 319, Docket 90–2583.
|
Argued Oct. 8, 1991.
|
Decided Jan. 28, 1992.

Synopsis

After defendant's state court robbery conviction was affirmed on direct appeal, 155 A.D.2d 236, 546 N.Y.S.2d 849, defendant petitioned for writ of habeas corpus. The United States District Court for the Southern District of New York, Louis L. Stanton, J., denied petition, and defendant appealed. The Court of Appeals, Oakes, Chief Judge, held that: (1) robbery victim's identification of defendant's jacket in police station following robbery could not form basis of claim that identification procedures created substantial likelihood of misidentification in violation of due process, and (2) admission of witnesses' testimony regarding their station-house identification of defendant's clothing did not violate defendant's right to due process.

Affirmed.

Jon O. Newman, Circuit Judge, filed opinion concurring in result.

Attorneys and Law Firms

***179** Robert J. Boyle, Brooklyn, N.Y., for petitioner-appellant.

Nancy D. Killian, Asst. Dist. Atty., New York City (Robert T. Johnson, Dist. Atty., Stanley R. Kaplan, Asst. Dist. Atty., of counsel), for respondent-appellee.

Before OAKES, Chief Judge, VAN GRAAFEILAND and NEWMAN, Circuit Judges.

Opinion

OAKES, Chief Judge:

Donald Johnson appeals from an order of the United States District Court for the Southern District of New York, Louis L. Stanton, *Judge,* denying his petition for a writ of habeas corpus. The district court found, *inter alia,* that even if the trial court's admission of the witnesses' out-of-court identifications of Johnson's clothing were so prejudicial as to give rise to a due process claim, any error committed in admitting this evidence was harmless beyond a reasonable doubt. Because we believe that the admission of testimony regarding the identification of Johnson's clothing cannot form the basis of a due process claim, we affirm.

I

As the district court explained, the prosecution presented evidence showing that in March 1986, Gloria Salinas, while working in a store in the Bronx, was accosted by a man who pointed a gun at her and took more than one hundred dollars in bills from behind the counter. After the man left with the money, Salinas followed him out of the store. Once outside, she pointed to the man and screamed to her acquaintance, Caesar Santaella, that the man had just robbed the store. When the man started to run, Santaella chased him until Santaella was halted by two policemen who themselves took up pursuit. The officers, without losing sight of the man, caught him in an abandoned lot. A frisk revealed a gun and $165 in bills.

The man the police caught was the appellant, Donald Johnson. Within one half-hour of apprehending Johnson, the police asked Salinas to view Johnson alone in a small room at the police station, where she identified him as the perpetrator of the ***180** robbery. She also identified the hat and jacket worn by Johnson at the time of his arrest as those worn by the man who stole the money from the store. Santaella also identified the hat at the station.

Prior to trial, the trial court found the evidence of Salinas' station-house identification of Johnson improperly suggestive and suppressed it. The court, however, refused to suppress the identifications of his hat and jacket. Thus, at trial, Salinas testified to her station house identification of the hat and jacket and also identified them again; Santaella testified similarly with respect to the hat. Johnson was convicted, after a jury trial, of first degree robbery. The Supreme Court

of New York, Appellate Division affirmed his conviction. *People v. Johnson,* 155 A.D.2d 236, 546 N.Y.S.2d 849, 850 (1st Dep't 1989). The New York Court of Appeals denied leave to appeal. 75 N.Y.2d 814, 552 N.Y.S.2d 564, 551 N.E.2d 1242 (1990).

II

Johnson first claims that the trial court's refusal to suppress the identifications of his clothing denied him due process of law under the Fourteenth Amendment. He reasons, pursuant to *Sanchell v. Parratt,* 530 F.2d 286, 292–294 (8th Cir.1976), that the identifications of his clothing were tainted by the preceding suggestive show-up and should have been suppressed under *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Neil provides that the admission of evidence, regarding a witness's out-of-court identification of a suspect, violates the defendant's right to due process when such evidence would create a very substantial likelihood of misidentification. *Neil,* 409 U.S. at 198, 93 S.Ct. at 381.[1] Under this standard, even a suggestive identification of a suspect will be admitted if the totality of the circumstances indicate that the identification was reliable. *Id.* at 199, 93 S.Ct. at 382. Thus, to prevail Johnson must show that there exists a very substantial likelihood of misidentification.

In *Sanchell,* several witnesses participated in visual showups which were determined to give rise to a denial of due process. *Sanchell,* 530 F.2d at 294–95. The court suppressed subsequent suggestive voice identifications: not only could the witnesses see the suspect, who they knew had been charged, but the suspect was black and his was the only voice of a black male that they heard. *Sanchell,* 530 F.2d at 297. Under these circumstances, the court found that the voice identifications were influenced by the earlier tainted visual showups. *Id.* In deciding to suppress the voice identification evidence, the court determined that the admission of this evidence created a substantial likelihood of irreparable misidentification. *Id.* at 296–97.

Although the case indicates that the suggestiveness of a visual identification can taint a subsequent voice identification, and that voice identification evidence can give rise to a due process violation, the case fails to address whether an identification of clothing that was rendered suggestive by an earlier showup can give rise to a substantial likelihood of misidentification—the gravamen of a due process violation. Indeed, appellant has pointed to no cases, and our research has revealed none, where the identification of physical evidence created constitutional concerns regarding the risk of misidentification.

In addition to the absence of precedent, Johnson's claim is flawed because the special dangers attendant to the identification of suspects do not exist with equal strength where the identification of clothing is concerned. Of course, the procedures used to obtain an identification of clothing can be suggestive. But it is the notorious inaccuracy of eyewitness identifications of *suspects* that gave the initial ***181** impetus to scholarly concern and judicial remedies. *See* Felice J. Levine, *The Psychology of Criminal Identification: The Gap From* Wade *to* Kirby, 121 U.Pa.L.Rev. 1079, 1081 (1973) ("Erroneous identification of suspects has long been recognized by commentators as a crucial problem in the administration of justice."); *United States v. Wade,* 388 U.S. 218, 228, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967) ("The identification of strangers is proverbially untrustworthy.") (quoting Justice, then Professor, Felix Frankfurter, *The Case of Sacco and Vanzetti* 30 (1927)). Moreover, the unfairness that results from a potentially inaccurate, confrontational identification of a suspect is compounded by the persuasiveness with which juries regard this evidence. Levine, *supra,* at 1081–82. As the Supreme Court explained in *Wade:* "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with ... the witness the sole jury ... and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.' " *Wade,* 388 U.S. at 235–36, 87 S.Ct. at 1937. We have no basis to believe that a witness's identification of clothing is either as susceptible to error or as persuasive to a jury as a witness's identification of a suspect. Indeed, a clothing identification is—particularly in this day and age of mass-marketing—often open to the argument that someone other than the perpetrator may have worn the same clothing. Thus, we find that identification of clothing is not a procedure so inherently "conducive to irreparable mistaken identification," *Foster v. California,* 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969) (quoting *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199 (1967)), as to provide the basis for a denial of due process. Any suggestiveness is of course a proper matter for cross-examination as well as argument. Therefore, Johnson's claim must fail.

Johnson next claims that the trial court's improper admission of hearsay testimony of Salinas and Santaella, regarding their station-house identifications of his clothing, violated his right to due process. The erroneous admission of evidence rises to a deprivation of due process under the Fourteenth Amendment only if the evidence in question "was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it." *Collins v. Scully,* 755 F.2d 16, 19 (2d Cir.1985). At Johnson's trial, apart from the challenged evidence identifying the clothing, the prosecution presented highly probative evidence of Johnson's guilt. As the district court noted, a closely-linked chain of witnesses connected Johnson to the robbery. When arrested he possessed a handgun as well as money of a quantity, and in denominations, consistent with Salinas' testimony regarding what had been taken from the store. Finally, although the jury was instructed that it could disregard his statement if it were involuntary, Johnson admitted to police officers that he had taken money from the store. This evidence demonstrates that even if the testimony regarding the station-house identification of Johnson's clothing were inadmissible hearsay, it neither provided the basis for his conviction nor removed a reasonable doubt that would have existed without it. Thus, appellant's claim is unavailing.

Affirmed.

JON O. NEWMAN, Circuit Judge, concurring in the result:
In this habeas corpus challenge to a state court conviction, the District Judge sensibly avoided deciding the constitutional question of whether a witness's identification of clothing was tainted by an impermissibly suggestive viewing of the suspect and ruled that any error was harmless beyond a reasonable doubt. Because I consider the constitutional issue far more troubling than do my colleagues and because the harmless error ruling made by Judge Stanton is so plainly correct, I concur in the judgment on the ground decided by the District Court.

The issue is not whether constitutional error occurs whenever a witness is shown one item of clothing and asked if he can ***182** identify it as having been worn by the perpetrator of a crime. I agree with Chief Judge Oakes that identification of clothing is not a procedure so inherently conducive to irreparable mistaken identification as to create the basis for a claimed denial of due process. The issue here concerns the significance of taint. The state trial court ruled that the viewing of the suspect by the witness Gloria Salinas in a one-person show-up was impermissibly suggestive. That Court suppressed Salinas's identification of the defendant. The defendant contends that the vice of focusing a witness's eye upon just one suspect and thereby unduly influencing the witness to identify the suspect carries over when, immediately after a one-person show-up, the witness is shown one article of clothing and, not surprisingly, identifies it as clothing worn by the perpetrator during the crime.

The fact that Johnson has no precise precedent for his claim of taint does not defeat the claim. The prosecutor is equally lacking in a precedent rejecting the claim of taint. The one reported decision bearing on the issue, *Sanchell v. Parratt,* 530 F.2d 286 (8th Cir.1976), lends some support to Johnson's position, though it is distinguishable. In *Sanchell,* a voice identification was suppressed on the ground that it was tainted by an unduly suggestive show-up of the suspect that immediately preceded the voice identification. It may well be that the risk of misidentifying a voice is greater than the risk of misidentifying clothing in many instances, although I would suppose that where the voice is distinctive and the clothing is not, the risks are reversed. However the risks are assessed, *Sanchell* indicates that the taint from an unduly suggestive show-up is cause for some concern.

Moreover, Johnson's claim raises two issues of taint. In addition to the risk that Salinas was unduly influenced to identify the clothing by the suggestiveness of the immediately preceding one-person show-up, there is also the concern that the clothing identification, regardless of its reliability, was tainted simply by the fact that it was the result of police misconduct. In some circumstances, evidence is deemed tainted by prior police misconduct even if the reliability of the subsequent evidence is not challenged. *See Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (fingerprints obtained during unlawful arrest). Evidence is suppressed if it was obtained by exploitation of "the primary taint," *see Wong Sun v. United States,* 371 U.S. 471, 486, 83 S.Ct. 407, 416–17, 9 L.Ed.2d 441 (1963) (statements obtained during unlawful arrest). Whether the "fruit of the poisonous tree" doctrine applies to evidence obtained as a result of an unduly suggestive show-up is a substantial issue.

Since the evidence of Johnson's guilt is so overwhelmingly established without any weight at all placed on the clothing identification, I would not reach any aspect of Johnson's taint claim and would affirm solely on the ground that any error as to the clothing was harmless beyond a reasonable doubt.

All Citations

955 F.2d 178

Footnotes

1 Note that the standard for the admissibility of an in-court identification that follows a pre-trial identification is similar: whether the pre-trial identification procedures lead to "a very substantial likelihood of *irreparable* misidentification." *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968) (emphasis added). *See also Dickerson v. Fogg,* 692 F.2d 238, 244 (2d Cir.1982).

600 S.W.3d 183
Supreme Court of Kentucky.

Dawan Q. MULAZIM, Appellant

v.

COMMONWEALTH of Kentucky, Appellee

Quincinio Deonte Canada, Appellant

v.

Commonwealth of Kentucky, Appellee

2018-SC-000466-MR
|
2018-SC-000471-MR
|
APRIL 30, 2020
|
Rehearing Denied February 18, 2021

Synopsis

Background: Defendants were convicted in the Circuit Court, 22nd Circuit, Fayette County, Pamela Goodwine, J., of first-degree robbery, tampering with physical evidence, and being first-degree persistent felony offenders. Defendants appealed.

Holdings: The Supreme Court, Hughes, J., held that:

as matter of first impression, identification procedure was not unduly suggestive due to digital editing of defendant's photograph to remove facial tattoo;

evidence raised question for jury as to identities of defendants as perpetrators;

prosecutor's closing argument on defendants' ability to investigate did not impermissibly shift burden of proof;

prospective juror was not excusable for cause based on his experience with a prior murder at his apartment complex;

information presented on prior convictions at penalty phase complied with evidentiary limitations on detail;

shackling during penalty phase after one defendant's outburst upon announcement of acquittal on murder charge was abuse of discretion; and

error in shackling defendants was harmless.

Affirmed.

***187** ON APPEAL FROM FAYETTE CIRCUIT COURT, HONORABLE PAMELA GOODWINE, JUDGE, NOS. 15-CR-00592-003, 15-CR-00592-001

Attorneys and Law Firms

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COUNSEL FOR APPELLEE: Daniel Jay Cameron, Attorney General of Kentucky, James Coleman Shackelford, Joseph A. Newberg II, Assistant Attorneys General, Office of Criminal Appeals.

Opinion

OPINION OF THE COURT BY JUSTICE HUGHES

A Fayette County jury found Appellants, Dawan Q. Mulazim and Quincinio Deonte Canada, guilty of several counts of first-degree robbery, tampering with physical evidence and of being first-degree Persistent Felony Offenders (PFOs). The trial court sentenced Mulazim to sixty years in prison and Canada to fifty years in prison in accordance with the jury's recommendation. Appellants raise identical issues concerning jury selection, admissibility of evidence, burden shifting, and shackling. After careful review, we affirm the trial court.

RELEVANT FACTS

On June 15, 2014, Shane Hansford and Mitchell Smith travelled to Lexington, Kentucky, to help set up a booth for a gun show. The two had a room at the Quality Inn near New Circle Road. Hansford's girlfriend, Jessica Rutherford,[1] met

them for dinner later that evening, and afterwards the three stopped by a liquor store before returning to the Quality Inn.

Sometime around 3:00 a.m., Rutherford stepped outside the hotel room to make a phone call, and Hansford followed her outside to smoke. Hansford left the door to the room partially open and joined Rutherford in an area that was well lit by surrounding lights from the pool and parking lot. While the couple were outside, two men appeared from around the corner and approached them. The men pointed their weapons at Hansford and Rutherford, demanded everything they had and forced them into their hotel room. Smith heard the commotion and retrieved Hansford's handgun, a .45 caliber Springfield XDS, from the nightstand as he prepared to confront the intruders. One of the men saw the gun and took it from Smith.

The man later identified as Mulazim instructed the three victims to lie face down on the beds while his accomplice, Canada, searched the drawers, Hansford's backpack, and under a mattress. At trial, Hansford testified that prior to leaving the hotel room one of the men looked at the other and said, "come on nephew." When asked which man made that statement, Hansford pointed at Mulazim. He also identified Mulazim as the man that held him at gunpoint, stating there was no doubt in his mind. Prior to trial Hansford identified Mulazim as one of the robbers from a photo lineup. Rutherford could not identify ***188** either of the robbers pre-trial, and Smith could not identify Mulazim but made an equivocal identification of Canada, choosing him and another person from the photo lineup.

The men stole Hansford's and Smith's wallets, a phone, the handgun, and a can of tobacco. Both Hansford and Rutherford called 911 separately to report the robbery. Meanwhile, Smith retrieved another handgun that was stored in their hotel room and pursued Mulazim and Canada but could not catch them. Police responded to the hotel where all three victims were visibly shaken. The victims provided descriptions of the suspects that included clothing type and color, hairstyle, and descriptions of the guns they used. The police later met with the victims to obtain spent casings from the stolen handgun and to present photo lineups.

At trial, the Commonwealth presented the testimony of a police detective who obtained Mulazim's and Canada's cell phone records and forensically examined Mulazim's phone. The phones contained text messages in which Mulazim referred to Canada as "nephew" and Canada referred to Mulazim as "unc." The police investigation also revealed that Canada's phone communicated through a cell tower approximately 1700 feet from the Quality Inn minutes before the 911 calls regarding the robbery.

On June 20, 2014, five days after the Quality Inn robbery, Megan Price was celebrating her birthday with her husband, Jonathan Price. The couple and a group of their friends met at Austin City Saloon in Lexington. Megan and Jonathan went outside a little after midnight to wait for their ride and two men approached them. Megan described one of the men as having dreadlocks and the other man as being shorter with short hair and a dark shirt. One of the men held a gun to Jonathan's head and told him to hand over his money, while the other man tugged at Megan's purse as she tried to hand it over. Megan heard a gunshot and fell, realizing she was shot in the leg. As Megan handed the man with dreadlocks her purse, Jonathan punched the other robber and told Megan to run. Jonathan was also shot, and the man with dreadlocks took his wallet as he fell to the ground. Megan required surgery for her gunshot wound and survived, but Jonathan died from his injuries. A surveillance camera from an adjacent business captured the incident, although the quality of the video played at trial was poor. Megan provided a description of the robbers to the police.

Detective Tim Upchurch was assigned to investigate the Quality Inn robbery and he entered the serial number of Hansford's stolen Springfield .45 XDS handgun into a national database for stolen weapons. The Bureau of Alcohol, Tobacco and Firearms later recovered Hansford's stolen handgun during a controlled street transaction with a man named Anthony Frye approximately two and a half months after Jonathan Price's murder. Detective Upchurch learned that police believed the same kind of gun stolen at the Quality Inn may have been used in the Austin City Saloon shooting based on the shell casings from the murder scene. Those casings were later compared with casings fired from the recovered handgun. Based on information received, Mulazim and Canada were developed as suspects for the crimes at both the Quality Inn and the Austin City Saloon.

Mulazim and Canada were both charged with the aggravated murder of Jonathan Price, the second-degree assault of Megan Price, and five counts of first-degree robbery, three at the Quality Inn and two at the Austin City Saloon. Mulazim was also charged with tampering with physical evidence. Canada was acquitted of all charges ***189** related to the events at Austin City Saloon, but the jury found him guilty of three

counts of first-degree robbery at the Quality Inn and of being a first-degree PFO. He received a sentence of fifty years on each count to run concurrently. The jury convicted Mulazim of the three robbery charges related to the Quality Inn incident, tampering with physical evidence, and of being a first-degree PFO. He received a sixty-year sentence. The jury could not reach a decision about Mulazim's guilt on any of the charges related to the Austin City Saloon incident. Both Defendants now appeal their convictions as a matter of right.

ANALYSIS

I. The trial court properly admitted Smith's pre-trial photo identification of Canada.

Prior to trial, Mulazim and Canada filed separate but similar motions to suppress the pre-trial identifications Hansford and Smith made to police, arguing that the photo identification procedures were unduly suggestive and unreliable. In this appeal, Appellants only raise arguments as to Smith's pre-trial identification of Canada.

Canada argues that the trial court erred by failing to suppress the identification because the photo lineup used an intentionally altered photograph. Specifically, Canada has a small tattoo on his face under his left eye, but the photo of Canada used in the lineup does not show the tattoo.

The trial court conducted an evidentiary hearing on the motion to suppress at which Officer Dunn testified as to how she assembled the photo lineup. She explained that she searched the Fayette County Detention Center website for photos of similar age subjects who had hair, eye color and skin tone comparable to Canada. She testified that Lexington Police guidelines at that time suggested that if a suspect had visible scars or tattoos present then that area of the suspect's face should be obscured in the photo and all subjects in the photo lineup should have the same parts of their faces covered as well. Officer Dunn testified that because another officer gave her the photo of Canada she was unaware at the time she used it that it had been altered.

The trial court denied the motion to suppress, stating the ruling might have been different if the three Quality Inn witnesses identified Canada's photo with absolute certainty. However, Hansford and Rutherford did not identify Canada, and Smith actually selected two photos out of the six photos in the lineup — one of Canada and one of a man incarcerated at the time of the crimes. He wrote "Number 2 & 5 look most like the man with the dreads that robbed me at gunpoint. If I saw them in person I could make a distinction from there and saw (sic) how tall they were." The trial court found that the photo lineup was not unduly suggestive and admitted Smith's pre-trial identification.

At trial, Smith testified that he identified two individuals in the photo lineup that looked like the man with dreadlocks that robbed him at gunpoint and further stated that he had told the police he would be better able to distinguish the men if he could see how tall they were. At that point, the Commonwealth directed Smith's attention to Canada, sitting in the courtroom, and Smith confirmed that he was the one who robbed him.

Canada fully cross-examined Smith about his in-court identification and his failure to identify Canada in the photo lineup prior to trial. Smith admitted that he did not say anything to the police about either of the robbers having a facial tattoo. Canada also introduced an expert who testified ***190** about the difficulty of cross-racial eyewitness identifications, and who cast doubt on the reliability of in-court identifications.

Determining whether identification testimony violates a defendant's due process rights requires a two-step process:

> First, the court determines if the identification procedures were impermissibly suggestive. If they were not, then the admission of evidence based thereon does not violate the Due Process Clause, and the inquiry is at an end. If the procedures were unduly suggestive, then the court moves to the second step of the test and determines whether, in light of the totality of the circumstances, the suggestive procedures created a very substantial likelihood of irreparable misidentification.

Duncan v. Commonwealth, 322 S.W.3d 81, 95 (Ky. 2010). "The 'clearly erroneous' standard applies to a trial judge's findings of fact on a motion to suppress evidence." *King v. Commonwealth*, 142 S.W.3d 645, 649 (Ky. 2004) (citing *Neil v. Biggers,* 409 U.S. 188, 199, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)). "A trial judge's ruling as to the admissibility of evidence is reviewed under an abuse of discretion standard." *Id.* The trial court abuses its discretion when its decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English,* 993 S.W.2d 941, 945 (Ky. 1999).

We begin by considering whether the identification was unduly or impermissibly suggestive. *Duncan*, 322 S.W.3d

at 95. Canada argues that because Smith did not describe the perpetrator as having a facial tattoo that the police intentionally altered Canada's photo to conform to Smith's memory of the events — *i.e.,* that he was robbed by a man without a facial tattoo. He insists that because the photo Smith identified (actually one of the two he singled out) was not a true representation of Canada's appearance, the trial court erred in admitting the identification. We disagree.

This issue is a novel one, with few cases from around the country addressing law enforcement officials digitally editing (photoshopping) identifying marks to remove them from a suspect's lineup photo. Much of the applicable case law focuses on lineups in which the "filler" photos are dissimilar to the defendant or descriptions of the suspect, thereby causing the defendant's photo to stand out to the witness making the identification. That is not a concern in this case because the individuals in Canada's lineup were substantially similar in appearance. The sole issue here is the alteration of Canada's photo to remove his facial tattoo.

In *United States v. Allen*, 416 F. Supp. 3d 1108 (D. Or. 2019), Allen robbed or attempted to rob four different banks. Several bank tellers served as witnesses, identifying the perpetrator with sufficient information to lead the police to suspect Allen. *Id.* at 1110-11. One witness remembered seeing faint tattoos on the robber's face, stating it appeared that the robber wore makeup. *Id.* at 1111. Allen has several tattoos on his face and in creating a lineup police photoshopped the tattoos out of the photo presented to the bank tellers. *Id.* The lineup included Allen's photo, along with photos of other individuals with similar features. *Id.* Three of the four bank tellers identified Allen as the perpetrator. *Id.* at 1112.

Allen moved to suppress the photo identifications because police modified his photo to remove his facial tattoos. *Id.* The U.S. District Court for the District of Oregon held that the procedure used by law enforcement was not unnecessarily suggestive under *Neil v. Biggers*. *Id.* at 1114. The ***191** court noted that no binding precedent conclusively resolved the case, but based its determination on the following: (1) the method of editing was neutral because the technician matched the color used to cover the tattoos with the same color as the skin surrounding the tattooed area; (2) one teller described faint tattoos, stating it appeared they had been covered; (3) the lineup was conducted double-blind to prevent bias; and (4) three of the four tellers identified Allen as the robber with a reasonably high degree of certainty. *Id.* The District Court also noted that the reliability of the identifications is an issue for the jury to resolve. *Id.* Finally, the District Court in *Allen* noted:

> This Court shares Defendant's concerns about the police conduct at issue in this case. It remains unclear to this Court where the line between constitutional and unconstitutional police conduct lies with regard to editing the photograph of a defendant in a lineup. But wherever that line is, it was not crossed here.

Id. at 1114.

Digital alteration of photos used in eyewitness identification lineups is a relatively new practice and there is little guidance as to what constitutes a permissible alteration. While facial tattoos are uncommon, many individuals may have other identifying marks on their faces, such as scars, birthmarks, or piercings. These types of features can make it increasingly difficult for law enforcement officers to find similar filler photos when preparing photo lineups. However, a defendant need not be surrounded by individuals nearly identical to him to render a pre-trial lineup and identification admissible. The ultimate concern is whether the manipulation of the defendant's photo resulted in an impermissibly suggestive identification procedure. Here, we can say with assurance that the procedure was not impermissibly or unduly suggestive.

Under the specific circumstances in this case, the identification procedures were not unduly suggestive because, as the trial court emphasized, Smith was unable to definitively identify Canada's photo as that of the man who robbed him. Smith merely reduced the field of photos from six to two. "The key to the first step is determining whether Appellant stood out of the lineup so much that the procedure was unduly suggestive." *Oakes v. Commonwealth*, 320 S.W.3d 50, 57 (Ky. 2010). Canada's photo does not stand out of the photo lineup. The fact that the other two victims, Hansford and Rutherford, were not able to identify Canada in the photo lineup, further establishes that it was not unduly suggestive.

As the trial court noted, the lineup would have most likely been challenged as impermissibly suggestive if police had left the tattoo on Canada's face because he undoubtedly would have stood out in the lineup. Would that have been the better alternative nonetheless? We need not decide that hypothetical but note as the federal district court did in *Allen* that there is a line between constitutional and unconstitutional conduct "with regard to editing the photograph of a defendant in a lineup." 416 F. Supp. 3d at 1114. That line was not crossed here where the small tattoo was photoshopped so that

Canada's face appeared as it would have without the tattoo. Further, we note that participants in lineups inevitably will have differing facial characteristics. It will be difficult, and perhaps impossible, for law enforcement officers to obtain photographs of virtually identical individuals, especially considering the various forms of distinguishing marks, features, and tattoos a person may have. In the end, issues such as this will have to be judged on a case-by-case basis.

***192** Canada argues that when police removed the tattoo from the photo they ensured they were making Smith's identification less reliable and the photo impermissibly suggestive because it catered to either a) Smith's correct recollection of being robbed by a man without a facial tattoo or b) Smith's incorrect recollection of being robbed by Canada, a man who did have a facial tattoo. As the Commonwealth contends, this argument conflates the weight and admissibility of an out-of-court identification. At trial Canada unquestionably was able to address the weight that the jury should give the identification both by cross-examining Smith and by offering expert testimony regarding cross-racial eyewitness identifications. Additionally, Canada had the opportunity to engage in a thorough cross-examination of the police officers as to how his photo was handled and how the lineup was assembled. The digital alteration of the photo was not problematic. In sum, the trial court did not err in finding the photo lineup was not impermissibly suggestive and therefore did not abuse its discretion in admitting the pre-trial identification.

II. The evidence of first-degree robbery was sufficient to overcome the motion for directed verdict.

At the close of the Commonwealth's case, Mulazim and Canada moved for a directed verdict of acquittal as to the first-degree robbery charges arising from the Quality Inn incident. They argued that no forensic evidence linked them to those crimes and that none of the stolen items were recovered. Further, they posited that the only probative evidence linking them to the Quality Inn robberies were the photo identifications, which they argue were equivocal at best.

A trial court's ruling on a motion for directed verdict is reviewed under the following parameters:

> When presented with a motion for a directed verdict, a court must consider the evidence as a whole, presume the Commonwealth's proof is true, draw all reasonable inferences in favor of the Commonwealth, and leave questions of weight and credibility to the jury. The trial court is authorized to grant a directed verdict if the Commonwealth has produced no more than a mere scintilla of evidence; if the evidence is more than a scintilla and it would be reasonable for the jury to return a verdict of guilty based on it, then the motion should be denied. *Id.* On appellate review, the standard is slightly more deferential; the trial court should be reversed only if it would be clearly unreasonable for a jury to find guilt.

Acosta v. Commonwealth, 391 S.W.3d 809, 816 (Ky. 2013) (citations omitted). We review a trial court's ruling on a motion for directed verdict for an abuse of discretion, with abuse occurring when the court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *English*, 993 S.W.2d at 945.

As noted, Appellants argue the only evidence linking them to the Quality Inn robberies were the victims' identifications. Although that is not the only evidence, we begin with the identifications. Prior to trial, Hansford identified Mulazim in a six-pack photo lineup, writing "The longer I look at the photos, number five [(Mulazim)] is who I feel robbed me." Additionally, Smith made the previously-discussed equivocal identification of Canada, stating that two of the six men in the photo array looked like the man who robbed him and that if he could see how tall the men are he could be more certain. Despite any hesitancy in their pre-trial ***193** identifications, both victims made positive in-court identifications of Mulazim and Canada during trial. As this Court stated in *King v. Commonwealth*, 472 S.W.3d 523, 526 (Ky. 2015), "[t]he testimony of a single witness is enough to support a conviction." Questions as to the credibility and weight given to testimony are reserved for the jury. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). The jury could properly weigh the facts presented in assessing the reliability of the identifications.

Moreover, other evidence supported a finding of guilt as to both Mulazim and Canada. The Commonwealth established that Canada is Mulazim's nephew, and the jury heard testimony that they referred to each other as "unc" and "nephew" in text messages. One of the Quality Inn victims testified that Mulazim said "come on nephew" before exiting the hotel room. In addition, Canada's cell phone pinged off a cell tower less than half a mile from the Quality Inn around the time of the robbery.[2] The standard for a directed verdict, requiring only evidence "sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty," applies "whether the evidence

is direct or circumstantial." *Brewer v. Commonwealth,* 206 S.W.3d 313, 318 (Ky. 2006). This evidence, in conjunction with the pre-trial and in-trial identifications of Mulazim and Canada, was more than sufficient to meet our directed verdict standard.

In support of their argument that the evidence was insufficient, Mulazim and Canada cite *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002), for the proposition that cross-racial identifications have diminished probative value. However, the Court in *Christie* primarily determined that a trial court erred in excluding expert testimony on the reliability of eyewitness identifications. *Id.* at 492. Here, the trial court permitted Appellants' expert to testify regarding memory and eyewitness identification. The expert proffered his opinion that identification of others from a different race was more difficult than those of the same race. The jury was free to accept or reject this testimony as they saw fit in assessing the identifications made by the victims in this case.

For directed verdict purposes, "the trial court must assume that the evidence for the Commonwealth is true ...[.]" *Benham,* 816 S.W.2d at 187. On the evidence presented, it was not unreasonable for the jury to conclude that Mulazim and Canada committed the Quality Inn robbery and consequently the trial court did not err in denying the Appellants' motions for directed verdict.

III. The Commonwealth's closing argument did not impermissibly shift the burden of proof.

During a lengthy closing argument, the Commonwealth made the following statements regarding the defense's ability to investigate by contacting the robbery victims:

> The defense gets all their information, contact information, it's clear, because they talked about their investigator going to talk to them. They can go talk to them and ask them, what'd they see, what they say. They can get all that information.

Defense counsel objected, arguing that the Commonwealth was shifting the burden of ***194** proof to the Defendants and that the victims had no obligation to cooperate with the defense investigation. Defense counsel requested an admonition to the jury that those witnesses were under no duty to cooperate and in fact chose not to cooperate with the defense. The trial court overruled the objection and declined to admonish the jury.

Appellants now argue that the trial court erred in denying the request for an admonition during closing argument. They maintain that the prosecutor's suggestion that Mulazim and Canada should have obtained more information from the witnesses prior to trial was impermissible burden shifting.

Kentucky Revised Statute (KRS) 500.070 states that "[t]he Commonwealth has the burden of proving every element of the case beyond a reasonable doubt...." Further, "[a]s the presumption of innocence mandates that the burden of proof and production fall on the prosecution, any burden-shifting to a defendant in a criminal trial would be unjust." *Butcher v. Commonwealth,* 96 S.W.3d 3, 10 (Ky. 2002). In reviewing a claim of an improper closing argument, this Court must keep in mind "the wide latitude we allow parties during closing argument," *Dickerson v. Commonwealth*, 485 S.W.3d 310, 331 (Ky. 2016), and must consider the closing argument as a whole, *Miller v. Commonwealth,* 283 S.W.3d 690, 704 (Ky. 2009). Here we find no impermissible burden shifting.

The Commonwealth's closing argument lasted over an hour and forty-five minutes. After the above-quoted statement was made, the Commonwealth continued its closing argument for another hour and a half. The Commonwealth "did not imply that the defendant bears the burden of proof to establish his innocence...." *Ordway v. Commonwealth,* 391 S.W.3d 762, 796 (Ky. 2013). Rather, the Commonwealth's statements merely suggested, correctly, that the defense is permitted to seek information from victims and witnesses. The Commonwealth did not comment on whether the defense actually sought information from the people involved in this case, nor did it comment on whether the victims and witnesses provided any information to the defense.[3] Clearly, the prosecutor did not state that defense investigators have the burden (or obligation) to talk to the victims and failed to do so here. The comments focused on by Appellants merely touched briefly on the defense's own ability to investigate, an important point given the defense's criticism of both the police investigation and the witnesses' allegedly changing memories regarding the robbers.

In *Ordway*, the defendant also argued that the Commonwealth impermissibly shifted the burden of proof, in that case by highlighting a defendant's ability to have evidence tested. 391 S.W.3d at 796. The Commonwealth made the following statements in its closing argument:

> [The defense] said Carlos Ordway would like to know what's on some of these things [e.g., the recorder]. Well if

> Carlos Ordway and his defense team wanted to know what was on some of these things, why didn't they, on June 4th, send them off? They could, too. They could too.... You see the defense has just as much access to the Kentucky State Police crime laboratory as the prosecution. They can ask anything they want to be examined by the Kentucky State Police. ***195** It's a little disingenuous to say that we hid things from them.

Id. This Court held that the argument was proper because in fact the defense is entitled to inspect and test evidence. *Id.* Here, the Commonwealth's closing argument is similarly acceptable because the defense is permitted to question victims, even though the victims may choose not to cooperate. In any event, the Commonwealth's closing argument comments did not imply that the defense had to talk to the victims or had some obligation that they failed to meet. Analogous to *Ordway*, these isolated comments regarding access to witnesses simply do not rise to the level of burden shifting.

IV. The trial court did not err in refusing to strike jurors for cause.

Mulazim and Canada next argue that the trial court erred in declining to strike five jurors for cause,[4] resulting in the Defendants being forced to use their peremptory challenges on those five individuals and thus depriving them of substantive rights pursuant to *Shane v. Commonwealth*, 243 S.W.3d 336 (Ky. 2007). In response, the Commonwealth notes that because the Defendants were given extra peremptory strikes, *i.e.*, more than required by Kentucky Rule of Criminal Procedure (RCr) 9.40, no error occurred pursuant to *Dunlap v. Commonwealth*, 435 S.W.3d 537, 582 (Ky. 2013). Before addressing this issue, we note that because of the Austin City Saloon crimes, specifically a murder in the course of first-degree robbery, both Defendants were subject to the death penalty. The Commonwealth gave notice of its intent to seek the death penalty and thus jury selection included both group and individual voir dire.

A. Extra peremptory strikes and the *Dunlap* issue

RCr 9.40 gives a defendant eight peremptory challenges plus one additional challenge if alternate jurors are seated. As construed by this Court in *Springer v. Commonwealth*, 998 S.W.2d 439, 444 (Ky. 1999), in a joint trial with two co-defendants if additional jurors are seated, the defense is entitled to thirteen peremptory strikes. Nine of these are joint strikes and then each defendant can exercise two independent challenges.

While trial courts are not required to grant extra peremptory strikes beyond those outlined in RCr 9.40, *Epperson v. Commonwealth*, 197 S.W.3d 46, 64-65 (Ky. 2006), trial judges sometimes provide extra strikes in major felony prosecutions, especially capital cases. This Court discussed awarding additional peremptory strikes in *Dunlap*, 435 S.W.3d at 537. In that case, the defendant argued that the trial court improperly denied his request to remove four jurors for cause. After addressing each of the challenged jurors, this Court concluded that one of the jurors should have been excused for cause, but the error was not reversible. *Id.* at 582. The trial court had provided the defendant with eleven peremptory strikes — two more than required under RCr 9.40 — while the Commonwealth only received the nine strikes provided for in the rule. *Id.* As a consequence, the defendant was able to remove the juror with one of his extra strikes without forfeiting the strikes he ***196** was entitled to under RCr 9.40. *Id.* This Court held:

> The trial court's wise decision to accord extra peremptory strikes to Appellant assured that one, or even two, errors in "for cause" determinations would not unfairly impact Appellant's "substantial rights" in the jury selection process by essentially giving him fewer peremptory strikes than the Commonwealth." *Id.*, citing *Shane v. Commonwealth*, 243 S.W.3d 336, 340-41 (Ky. 2007)....

Id. The *Dunlap* Court then summarized:

> To be clear, a trial judge acts within his or her discretion where, as here, he or she grants a criminal defendant more peremptory strikes than the Commonwealth receives. Trial judges are not impervious to errors in "for cause" strike determinations. Of course, at a certain point, a trial judge abuses his or her discretion by granting a criminal defendant *too many* extra strikes.

Id. Because *Dunlap* was a capital case, the Court concluded that the trial court acted well within its discretion by awarding the defendant two extra peremptory strikes. *Id.* More importantly, even though the trial court erred in not striking one of the challenged jurors, Dunlap did not lose the value of his peremptory strikes under our criminal rules.

The present case also involves extra peremptory strikes, but the issue is more complex than *Dunlap* because the trial court gave extra strikes to both the Commonwealth and the defense. Given the complexity of this issue, it is important to understand exactly how RCr 9.40 works and what the trial court did in this case. RCr 9.40 states in its entirety:

(1) If the offense charged is a felony, the Commonwealth is entitled to eight (8) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.

(2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side and each defendant shall be increased by one (1).

(3) If more than one defendant is being tried, each defendant shall be entitled to at least one additional peremptory challenge to be exercised independently of any other defendant.

Here, the Commonwealth and the Defendants jointly were awarded the standard eight peremptory strikes under subsection (1) because this is a felony case. Additional jurors were seated in this case, meaning that under subsection (2) the Commonwealth was awarded an additional strike, bringing its total to nine strikes. Under subsection (2), the defense "side" was awarded one additional joint strike, and then each Defendant received an additional strike. Moving to subsection (3), each Defendant was awarded one additional strike because it was a joint trial. Therefore, pursuant to RCr 9.40, the Commonwealth was entitled to nine (9) peremptory strikes and the Defendants were entitled to a total of thirteen (13) peremptory strikes. To summarize, as this Court did in *Springer v. Commonwealth*, 998 S.W.2d at 444, under the rule the authorized peremptory challenges were:

The Commonwealth's strikes:

RCr 9.40(1) - 8 strikes

RCr 9.40(2) - 1 strike

RCr 9.40(3) - no strikes

Total: 9 strikes

The Defendants' strikes:

RCr 9.40(1) - 8 strikes jointly

RCr 9.40(2) - 1 strike jointly

***197** RCR 9.40(2) - 1 strike Canada, 1 strike Mulazim

RCr 9.40(3) - 1 strike Canada, 1 strike Mulazim

Total: 13 strikes

After the first part of subsection (2) is applied — the language regarding "each *side*" receiving an additional strike — both the Commonwealth and the Defendants are evenly matched with nine strikes each. As noted *supra*, in *Springer*, the Court interpreted subsection (2) to mean that not only does each side get one additional strike but then "each defendant" gets one additional strike. 998 S.W.2d at 444.

The result of applying RCr 9.40 in a case such as this, where there is an additional juror seated and there are two co-defendants, is that the two sides are evenly matched at nine (9) peremptory strikes, then each Defendant gets two (2) additional strikes for a total of thirteen (13) strikes. Here, however, both sides were evenly matched at twelve (12) strikes because the trial court gave both the Defendants and the Commonwealth extra strikes. Thus, twelve (12) strikes is the baseline but the Defendants are entitled to the benefit built into RCr 9.40, *i.e.*, two (2) extra strikes each. In this case, the trial court went further and gave each Defendant four (4) additional extra strikes for a total of twenty (20) strikes.

Taking the extra strikes into consideration, both the Commonwealth and the Defendants were evenly matched at twelve (12) strikes but each Defendant needed to have at least two (2) strikes to exercise independently in order to receive the full benefit accorded the defense in RCr 9.40. With this analysis, the Defendants should have been able to exercise sixteen (16) peremptory strikes. The Defendants now argue that five jurors should have been stricken for cause, and because they were not stricken, they ultimately had to use their peremptory challenges on these jurors. When considering the numbers outlined above, however, the only way the Defendants could have been harmed is if their number of strikes fell below sixteen (16), which represents the baseline number of strikes allotted to both sides, twelve (12), plus the two (2) additional strikes each Defendant is entitled to under the rule (2+2=4).

The bottom line is that the trial court could have erroneously failed to exclude four (4) jurors for cause, and the Defendants would still have received everything they were entitled to under RCr 9.40. Essentially, the extra peremptory strikes granted by the trial court have the potential to insulate the result from reversal and in this case they did. We now address the arguments regarding two of the five jurors, both of whom the trial court correctly allowed to continue in the jury pool despite the Defendants' for-cause challenges.

B. For-cause challenges

"When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified." RCr 9.36(1). "Whether to exclude a juror for cause lies within the sound discretion of the trial court, and on appellate review, we will not reverse the trial court's determination unless the action of the trial court is an abuse of discretion or is clearly erroneous." *Hilton v. Commonwealth*, 539 S.W.3d 1, 11 (Ky. 2018) (citations omitted). The erroneous failure to excuse a juror for cause "necessitating the use of a peremptory strike is reversible error," *id.* at 12, unless as here, the provision of extra peremptory strikes has avoided reversible error because the Defendants received everything (and perhaps more than) they were entitled to under RCr 9.40.

***198 i. Juror 5132**

During voir dire, Juror 5132 stated that he used to go to Austin City Saloon as recently as six or seven years ago when he lived in an apartment complex nearby. When a group of prospective jurors was later invited by the trial court to share any additional information they believed the court should be aware of, this juror approached the bench and explained that someone was murdered near his apartment complex approximately one year prior. Juror 5132 was the person that called 911 and was interviewed by the police. He no longer lives in the apartment complex. When asked by the trial court, he twice stated that incident would not impact his ability to listen to the evidence as presented. Juror 5132 was not a crime victim, and he did not witness a crime. He simply came upon the aftermath of a crime and called 911.

Mulazim and Canada argue that this juror's experience with the murder near his apartment was traumatic and that it is reasonable to believe that this trauma would impact his views of this case and impair his ability to render an impartial verdict. We disagree. The trial court did not abuse its discretion in denying the motion to strike Juror 5132 for cause because the juror's knowledge of the murder at his apartment complex was minimal and he recognized it as a separate event with no bearing on the present case. Juror 5132 stated specifically that his experience was not relevant to this case and that he could undoubtedly separate the events and render a decision based on this case and the evidence presented. He stated that he knew very little about the underlying facts in the issue at his apartment other than it was a domestic dispute, and while he was impacted immediately after that event, it was over a year ago and would have no impact on him as a juror.

Mulazim and Canada also challenge the failure to strike Juror 5132 because they allege he expressed an inability to consider mitigating evidence. During individual voir dire the trial court advised Juror 5132 of the five possible penalties for aggravated murder, including the death penalty. The juror affirmed he could consider the full range of penalties in the event the Defendants were found guilty. Juror 5132 also affirmed that he could consider mitigators in a penalty phase of trial, including age, background information such as childhood and where a person grew up, and mental disorders. He also stated later he could consider mitigators such as having a "rough background" or a low IQ. When defense counsel asked about whether he considered age and IQ to be mitigating, he said no. He essentially stated that even with age and IQ that without a mental disability "you still know what you should be doing and what you shouldn't be doing." When later asked about anything else he might consider in mitigation, he stated he might consider a person's upbringing.

At worst, this juror's responses about mitigating factors were ambiguous. When questioned by the trial court, he initially stated that he could consider a wide range of mitigating factors during the penalty phase, but later stated he could not consider two mitigating factors — age and IQ. He affirmatively stated that he could consider a person's "rough background" and IQ when questioned by the Commonwealth.

In *Harris v. Commonwealth*, 313 S.W.3d 40 (Ky. 2010), this Court addressed potential jurors who were similarly challenged by the defense for an alleged unwillingness to consider mitigators. This Court's unanimous decision by Justice Venters is highly instructive.

> ***199** Finally, none of these jurors was disqualified because of an unwillingness to consider mitigating evidence. As noted above, in cases such as *Penry* [*v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001)], *Eddings* [*v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], and *Morgan* [*v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)], the United States Supreme Court has held that a capital defendant is entitled to present mitigating evidence to the jury, that the jury must be allowed to give effect to that evidence if it is so inclined, and that a juror who would give no effect to any mitigating evidence but would always vote to impose the death penalty for a capital crime is disqualified. There is no entitlement,

> however, to a jury or to individual jurors committed at the outset to view particular mitigating factors as having a mitigating effect. *Walker* [*v. Com.*], *supra* [288 S.W.3d 729 (Ky. 2009)] (lack of significant criminal history); *Winstead v. Commonwealth*, 283 S.W.3d 678 (Ky. 2009) (poverty and difficult family life); *Fields* [*v. Com.*], *supra* [274 S.W.3d 375 (Ky. 2008)] (intoxication); *Sherroan v. Commonwealth*, 142 S.W.3d 7 (Ky. 2004) (troubled background); *Stopher* [*v. Com.*], *supra* [57 S.W.3d 787 (Ky. 2001)] (voluntary intoxication). Jurors 26, 29, and 86 were not disqualified, therefore, merely because they stated that particular factors, such as lack of a significant criminal history or domination by another person (juror 26); low IQ, an abusive childhood, or the lack of a significant criminal record (juror 29); youth, an abusive childhood, or intoxication (juror 86); were facts not likely to have much bearing on their penalty decisions.

Id. at 47. Thus, Appellants err in arguing that Juror 5132 had to be stricken if he had reservations about particular mitigating factors.

Despite stating that a person should know right from wrong regardless of age and IQ, Juror 5132 also stated that he could consider all mitigating circumstances when prompted by the trial court, and later affirmed that he could consider certain mitigating factors. Additionally, when asked about the range of possible penalties, he stated that he would have to consider a person's life prior to the crime. The determination as to whether to exclude a juror for cause "is based on the totality of the circumstances ... and not on a response to any one question." *Hunt v. Commonwealth*, 304 S.W.3d 15, 43 (Ky. 2009). Based on all the juror's responses and *Harris*, the trial court did not abuse its discretion in denying the challenge on these grounds.

ii. Juror 5328

Mulazim and Canada argue that this juror should have been stricken for cause because he would not consider age, IQ or mental illness in mitigation. After reviewing voir dire and given our *Harris* guidelines, we disagree.

The trial court questioned Juror 5328 at the outset of individual voir dire and the juror confirmed that he could consider things such as background, upbringing, childhood experiences, education, trauma, and mental health issues. He also confirmed that he could consider age and IQ. Mulazim and Canada point to one instance where counsel asked him if he could consider whether being a young adult, having a low IQ or mental health issue would be a reason to give a lesser sentence and the juror said no. However, we note that this question came toward the end of the questioning and after a long series of different hypotheticals. Additionally, even after responding "no," this juror again reiterated ***200** that one must look at everything and decide accordingly.

After defense counsel asked him the question about being a young adult or having a low IQ or mental health issue, the Commonwealth attempted to clarify his responses. The following exchange occurred:

> Commonwealth: So, I guess the question at the end of the day is if the judge instructs you to consider all of those mitigating factors, being age, IQ, background, upbringing, could you give them all meaningful consideration?
>
> Juror 5328: You have to. How can you not?

Throughout voir dire, this juror repeatedly stated that he would want and need to know everything about a crime — a person's background, why they committed the crime, their upbringing, how they were raised — and noted that these factors could "change things." When counsel asked whether a defendant accused of murder having a rough upbringing would be a reason to give a lesser sentence, he said he was not sure and that he would have to hear everything. He repeatedly indicated that sentencing is not something to be taken lightly and stated that he would to look at everything and assign a punishment on an individual basis. When asked broadly about his understanding of mitigators, he stated that you have to look at socioeconomic background and a person's upbringing. The juror even referenced considering mitigators and stated that he would not be able to decide without looking at everything, classifying it as a huge factor in the decisions jurors are tasked with making.

Mulazim and Canada argue that Juror 5328 only wanted to consider motive in mitigation of a murder. Consideration as to the reasons or motivation for murder is a relevant factor in assessing a penalty. Again, as with the juror above, the trial court must consider the totality of the circumstances. *Hunt,* 304 S.W.3d at 43. Juror 5328 repeatedly and unequivocally stated that he would have to consider numerous factors in imposing a penalty, most of those being mitigating factors under KRS 532.025.

It appears that Mulazim and Canada simply wanted this prospective juror to assess certain factors more than others.

But a defendant is not entitled "to a jury or to individual jurors committed at the outset to view particular mitigating factors as having a mitigating effect." *Harris*, 313 S.W.3d at 47. As in *Harris*, this juror should not have been disqualified merely because he once stated, despite otherwise contradicting, that he would not consider age and IQ as mitigating factors. This juror repeatedly indicated that there were circumstances in which an aggravated murder would warrant a penalty other than death based on the facts of the case and that his decision on a penalty would not only be based on the crime but the circumstances as well. The trial court clearly did not abuse its discretion in failing to strike this juror for cause.

Having concluded that the trial court did not err as to two of the challenged jurors (Jurors 5132 and 5328), we need not dissect the voir dire of the remaining three jurors who were challenged because assuming arguendo the trial court erred on all three, the Appellants would still have had seventeen (17) peremptory challenges, one more than they were entitled to in order to maintain the defense advantage built into RCr 9.40. We reiterate that the trial court's and counsel's extensive inquiry into mitigators on individual voir dire only occurred because the case was tried as a capital offense due to the murder and robbery at the Austin City Saloon. Notably, no convictions occurred on those offenses and consequently the jury never considered ***201** aggravated penalties, rendering Appellants' focus on the jurors' ability to consider mitigation evidence questionable at best. In any event, Appellants have identified no reversible errors in the jury selection process.

V. The information presented in the penalty phase complied with *Mullikan v. Commonwealth.*

Prior to the penalty phase, defense counsel inquired as to how the Commonwealth intended to prove Mulazim's and Canada's prior convictions, citing the limitations set by this Court in *Mullikan v. Commonwealth*, 341 S.W.3d 99, 109 (Ky. 2011). In the Commonwealth's penalty phase opening statement, the prosecutor stated that Canada had a felony conviction for first-degree wanton endangerment stemming from an attempt to push someone off a second story platform. Additionally, the Commonwealth told the jury that Mulazim was convicted of first-degree wanton endangerment on three separate occasions for unlawfully shooting a gun — twice for shooting at a home with people inside and once for shooting at someone. When the Commonwealth read from the indictments that led to the prior convictions, it provided the same information. Mulazim and Canada now argue that the trial court violated KRS 532.055 and *Mullikan* by allowing the jury to hear evidence beyond the nature of their prior offenses.

KRS 532.055(2)(a) states in part that, in the sentencing stage in felony cases, "[e]vidence may be offered by the Commonwealth relevant to sentencing including: (1) [m]inimum parole eligibility, prior convictions of the defendant, both felony and misdemeanor; (2) [t]he nature of prior offenses for which he was convicted...." In *Mullikan*, this Court held that "the evidence of prior convictions is limited to conveying to the jury the elements of the crimes previously committed. We suggest this be done either by a reading of the instruction of such crime from an acceptable form book or directly from the Kentucky Revised Statute itself." *Mullikan*, 341 S.W.3d at 109.

In William S. Cooper and Donald P. Cetrulo, *Kentucky Instructions to Juries, Criminal* § 3.58 (6th ed. 2019), the elements of first-degree wanton endangerment are captured in the following jury instructions:

A. That in this county on or about _____ (date) and before the finding of the Indictment herein, he _____ (method);

B. That he thereby wantonly created a substantial danger of death or serious physical injury to _____ (victim);

AND

C. That under the circumstances, such conduct manifested extreme indifference to the value of human life.

Telling the jury that Mulazim twice shot at homes while people were inside and that he once shot at someone is necessary to identify the method he used to commit the offenses. Similarly, informing the jury that Canada attempted to push someone off a second story platform is necessary to explain his method of wanton endangerment, *i.e.*, the way in which he placed the victim in substantial danger and exhibited "extreme indifference to the value of human life." The Commonwealth followed the elements listed in Cooper's *Instructions* when it presented Appellants' prior convictions. The explanations of the methods by which the criminal offenses were committed were not error.

VI. Shackling the Appellants during the penalty phase was error but harmless.

Just prior to the jury returning to the courtroom with their verdicts in the guilt ***202** phase, the trial court asked all present in the courtroom to remain calm and exercise restraint. When the trial court read that Canada was found not guilty of

murder in the Austin City Saloon incident, Mulazim hit the table three times and Canada raised his arms. The rest of the jury's verdicts were read without issue.

The next day defense counsel reminded the trial court that the Fayette County jail staff has a policy of using ankle shackles on defendants absent an instruction from the court to remove those restraints. Defense counsel asked for the shackles to be removed, but the trial court refused, stating:

> I was asked that they be in restraints, and after what happened last night I agreed to have them in restraints this morning, so I'm not removing the restraints from the Defendants. They are convicted now of additional charges and I'm not removing the restraints. So, it's noted but ... they did ask me that, well they didn't ask me but they told me they were going to do that unless I instructed them otherwise. And I said that I would not be instructing them otherwise. I mean, despite my warning about no outbursts, he did it anyway. And so, it's unfortunate but that's I just feel like that's appropriate under the circumstance.[5]

Both Defendants then entered the courtroom for the penalty phase in ankle shackles. Once the Defendants were seated at their respective tables, the jury was brought into the courtroom. Thus, as the Commonwealth emphasizes, the jury did not see the Defendants walking in shackles.

The Commonwealth further argues that based on the layout of the courtroom and the respective positions of the Defendants, jury and judge, it was impossible for the jury to see the Defendants' shackles. Given the subpar video quality of the penalty phase proceedings, we cannot assess whether the shackles were visible to the jury. However, given that the Defendants were only shackled at the ankles and were seated with their feet underneath the table, we think it is unlikely that the jury noticed the shackles. As noted, the jury did not witness the Defendants walking into the courtroom while shackled.

"Shackling of a defendant in a jury trial is allowed only in the presence of extraordinary circumstances." *Barbour v. Commonwealth,* 204 S.W.3d 606, 612 (Ky. 2006) (citing *Peterson v. Commonwealth,* 160 S.W.3d 730, 733 (Ky. 2005)). Disfavor of the practice is also reflected in RCr 8.28(5), which states that "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint." When reviewing a trial court's decision to keep a defendant in shackles in the presence of the jury, we give great deference to the trial court. *Barbour*, 204 S.W.3d at 612. However, there generally must be "substantive evidence or [a] finding by the trial court that Appellant was either violent or a flight risk...." *Id.* at 614. The trial court's decision to keep a defendant in shackles is reviewed for an abuse of discretion. *Id.*

The *Barbour* Court cited cases illustrating the type of exceptional circumstances justifying the need for shackling. *Hill v. Commonwealth*, 125 S.W.3d 221, 235-36 (Ky. 2004), involved a defendant who was appropriately shackled due to his prior escape and his skills in martial arts. In *Peterson,* 160 S.W.3d at 734, the defendant's ***203** belligerent conduct prior to trial and refusal to acknowledge the need to control his behavior during trial, raised a serious issue of courtroom security justifying shackles. In *Commonwealth v. Conley*, 959 S.W.2d 77, 78 (Ky. 1997), the defendant had fled the courtroom during a prior appearance and the court had good reason to believe it might occur again. "These cases illustrate the sort of limited circumstances, complete with specific trial court findings, that have justified allowing a defendant to remain shackled before the jury." *Barbour*, 204 S.W.3d at 613.

In this case the shackling of the Defendants was based on a finding that Mulazim and Canada specifically disregarded the court's instruction to remain calm while the verdict in the guilt phase was read. The trial court determined that shackling was appropriate under the circumstances, especially considering that the men had just been found guilty of serious charges. Mulazim and Canada argue that the shackling was prejudicial because the restraints sent a message to the jury that they were dangerous men and deserved long sentences.

Despite the arguably aggressive nature of Mulazim's outburst, we recognize that banging on the table was most likely done in celebration, not to intimidate or be violent. While we do afford great deference to the trial court in making these determinations, we do not consider this to rise to the level of "extraordinary circumstances" as seen in cases in which shackling was upheld. Additionally, even if the trial court determined that due to the outburst Mulazim should be shackled, this decision could not extend to Canada who merely raised his arms when the trial court stated he was acquitted on the murder charge. We conclude that the decision to shackle the Defendants in this case was an abuse of discretion.

However, this error is subject to the harmless error analysis under RCr 9.24, which states we "must disregard any error or defect in the proceeding that does not affect the substantial

rights of the parties." In *Winstead v. Commonwealth*, 283 S.W.3d 678, 688-89 (Ky. 2009), we noted that a non-constitutional error is harmless "if the reviewing court can say with fair assurance that the judgment was not substantially swayed by the error." (citing *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)). After reviewing all of the circumstances, we do not believe the shackles, assuming the jury was able to see them, substantially impacted the sentences the Defendants received.

The admittedly serious sentences received by the Defendants are unsurprising given the egregious nature of the crimes charged and ultimate convictions. Both men were charged with murder and three counts of first-degree robbery, all violent offenses.[6] Additionally, during the penalty phase, the jury heard that they had numerous prior convictions, including convictions for wanton endangerment, assault, robbery, burglary, and fleeing from police. We cannot say that given their new convictions and Mulazim's and Canada's criminal histories, the mere possibility that the jury saw the shackles impacted the sentencing.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

All sitting. All concur.

All Citations

600 S.W.3d 183

Footnotes

1 Subsequent to the crimes committed in this case, Jessica Rutherford married Shane Hansford. The parties in this case referred to her as "Jessica Hansford," but to avoid confusion we refer to her by her maiden name.

2 The police obtained warrants for historical cell-site data for Canada's phone. The data revealed that his phone communicated with the cell tower close to the Quality Inn at 3:08 a.m. The police were dispatched to the scene thirteen minutes later to respond to the robbery reported by Hansford and Rutherford.

3 In fact, a defense investigator testified that he spoke with Smith and Rutherford about the robbery.

4 Canada identified six jurors he would have stricken had he not had to use his peremptory strikes on the five jurors that the trial court should have dismissed. In *Floyd v. Neal,* 590 S.W.3d 245, 253 (Ky. 2019), this Court stated that to preserve a for-cause strike error for review that a one-to-one ratio of for cause strikes to would-be peremptory strikes is required. However, since this trial pre-dated that decision the issue is still preserved in this case.

5 It is unclear from the record who requested that the Defendants remain in shackles. In its brief, the Commonwealth posits that the request was made by the corrections officials or deputies of the Fayette County Sheriff's Office. The colloquy during Canada's objection to shackling suggests that the Commonwealth did not make the request.

6 While the jury acquitted Canada of murder and was hung on Mulazim's murder charge, according to CourtNet, Mulazim was subsequently convicted of Jonathan Price's murder and sentenced to life imprisonment without the possibility of parole.

519 F.2d 798
United States Court of Appeals,
First Circuit.

George NASSAR, Petitioner-Appellant,

v.

Douglas VINZANT, Superintendent, etc., Respondent-Appellee.

No. 74-1429.
|
June 26, 1975.

Synopsis

Appeal was taken from a judgment of the United States District Court for the District of Massachusetts, Frank H. Freedman, J., denying a petition for a writ of habeas corpus. The Court of Appeals, Levin H. Campbell, Circuit Judge, held that although 7:00 a. m. arrival of two police officers bearing single photograph carried some suggestive connotations, where eyewitnesses observed murderer at close range, in good light and in situation likely to fix his image firmly in their minds, eyewitnesses were shown several photographs on night of murder but did not make any identification, and single photograph identification occurred only two days after the crime, photographic identification was not so impermissibly suggestive as to require reversal.

Affirmed.

Attorneys and Law Firms

***799** Lois M. Lewis, West Newton, Mass., by appointment of the Court, for petitioner-appellant.

Barbara A. H. Smith, Asst. Atty. Gen., with whom Francis X. Bellotti, Atty. Gen., and John J. Irwin, Jr., Asst. Atty. Gen., Chief, Crim. Div., were on brief, for respondent-appellee.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

Opinion

LEVIN H. CAMPBELL, Circuit Judge.

Appellant, George H. Nassar, was convicted in the Massachusetts Superior Court for the first degree murder of Irvin Hilton. On appeal the judgment was vacated by the Supreme Judicial Court, which held that evidence of Nassar's prior criminal record impermissibly had been allowed to reach the jury. Commonwealth v. Nassar, 351 Mass. 37, 218 N.E.2d 72 (1966). The Commonwealth retried Nassar, and he was again convicted. This judgment was upheld by the Supreme Judicial Court, Commonwealth v. Nassar, 354 Mass. 249, 237 N.E.2d 39 (1968), and the Supreme Court denied his petition for a writ of certiorari, Nassar v. Massachusetts, 393 U.S. 1039, 89 S.Ct. 662, 21 L.Ed.2d 586 (1969). In 1974, Nassar filed a petition for a writ of habeas corpus in the district court, 28 U.S.C. s 2254, alleging that the identification procedures utilized in the course of the investigation of Hilton's murder served to deny him his rights to a fair trial under the sixth and fourteenth amendments. The district court, without holding an evidentiary hearing on appellant's contentions, see 28 U.S.C. s 2254(d), granted appellee's motion to dismiss the petition. After obtaining the requisite certificate of probable cause, id. s 2253, Nassar filed the instant appeal.

Analysis of appellant's claim requires that we sketch relevant portions of the evidence offered at his trial:

On September 29, 1964, at approximately 3:45 p. m., Mrs. Rita Buote and her daughter, Diane, drove into a filling station in Andover, Massachusetts, intending to purchase gasoline. In the station, near the lubritorium, the proprietor Irvin Hilton was on his knees looking up at a man who held a gun in his hand. This man shot Hilton, who fell over on his side. The man then fired three more shots into Hilton's body.

Hilton's assailant walked rapidly toward the Buote vehicle, approaching the door on the driver's side. Mrs. Buote locked the car door, preventing the man from opening it. The man then pointed the gun at Mrs. Buote and twice pulled the trigger, but the gun did not fire. The man began banging on the window and attempted to get the door open. Failing this, he stood for a moment and looked toward the highway. Both Buotes crouched below the seats of their vehicle, and when they arose a short time later the assailant had gone.

These events were also observed by two men who had driven into the filling station while Hilton's murder was in progress. Their vehicle was more distant than that of the Buotes, however, and owing to this and to their interest in “getting out of there,” these men were unable to provide more than a general description of the assailant.

They did observe that the murderer departed the station in what they described as a black automobile bearing Virginia license plates with the number 960-947.[1] This information was important in view of another witness, Ruth Watson, who testified that approximately 3:15 p. m. on the afternoon of September 29, 1964, she had seen a car fitting this description on a road in Andover close by the Hilton filling station. Watson had not testified at Nassar's first trial, and her taking the stand at the second caught the defense somewhat unprepared. After obtaining a short continuance to check out her story, however, and after attempting to shake her story, appellant's counsel stated that he ***800** was satisfied that Watson had seen the vehicle as she described.

Police investigation of the Hilton murder focused upon the Buotes, as they were the only persons known to have observed the assailant sufficiently to identify him. The police obtained descriptions of the assailant from both Mrs. Buote and Diane. On the night of the murder each was shown a spread of photos, not including any of appellant, but they could not select any of these as being that of the murderer. The next day Mrs. Buote assisted an Andover police officer in the preparation of a sketch of the man she had seen. This sketch, which Mrs. Buote agreed was "a fair likeness" of the assailant, was then shown to Diane. The sketch was published in the newspapers the following day, with information that the police were looking for a man resembling the sketch.

A Lawrence, Massachusetts, police officer, who was on station duty the night of September 30 to October 1, saw this sketch in the October 1 edition of a Lawrence newspaper. The officer was in no way connected with the murder investigation being conducted by the Andover police, and had no training as a detective. On a "hunch", he selected a photo of appellant from police files and showed it to his superiors. A bit later that morning the officer and another member of the Lawrence police force, without any attempt to contact the Andover police concerning the Hilton investigation, took this photo of Nassar to the Buote home. Arriving there at approximately 7 a. m., they displayed the photo, a "mug shot" portraying appellant in both profile and fullface views, to Mrs. Buote. Initially she wasn't sure, but upon seeing the fullface portion in better light she stated, "That's him." Later, Diane was brought into the room and was separately shown the photograph. She also identified it as being a picture of the man they had seen murder Irvin Hilton. The two Lawrence officers subsequently delivered this photo of Nassar to the Andover police. Sometime later that day, two Andover policemen went to the Buote residence and showed both Mrs. Buote and Diane, separately, a number of pictures. Each picked out the same photo of Nassar that they had identified early that morning during the visit from the Lawrence police.

At the trial Mrs. Buote and Diane each identified appellant as the man they had seen shoot Irvin Hilton. In addition, there was testimony presenting for the jury the Buotes' out-of-court identifications of Nassar's photo under the circumstances above described. Ruth Watson testified that the man she had seen driving the car with the Virginia license plates shortly before the murder was George Nassar. The foregoing, with the exception of some testimony tending to a show a possible motive for robbery, constituted the entire case for the prosecution.

Appellant contends that his identification by the Buotes was the result of impermissible police suggestion violative of his constitutional rights. He argues that showing the Buotes a single photo shortly after they had arisen necessarily implanted in their minds the suggestion that the police thought the man in the photograph had committed the crime, and that this so tainted the validity of the Buotes' identifications as to require reversal of his conviction. This claim was fully considered by the Supreme Judicial Court on Nassar's second direct appeal, and that court rejected it, as did the district court below. We agree with these conclusions, while concurring in the Supreme Judicial Court's criticism of the actions of the two Lawrence police officers.

Appellant's claim is to be tested against the requirement that a conviction will be set aside "only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of . . . misidentification." See Simmons v. California, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968); ***801** Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).[2]

We can agree that the arrival, at 7 a. m., of two police officers bearing a single photograph carries some suggestive connotations. But we do not think those facts sufficient in themselves to support the conclusion that appellant's conviction must be vacated. Insofar as cases such as United States v. Fowler, 439 F.2d 133 (9th Cir. 1971), may be read to announce a per se rule condemning as constitutionally infirm all evidence derived from single photo identifications, see Workman v. Cardwell, 338 F.Supp. 893, 895-96 (N.D.Ohio 1972), aff'd, 471 F.2d 909 (6th Cir. 1972), cert. denied, 412 U.S. 932, 93 S.Ct. 2748, 37 L.Ed.2d 161 (1973), we do not

follow them. Single photo identifications do, indeed, present so serious a danger of suggestiveness as to require that they be given extremely careful scrutiny, but beyond stating this, we cannot provide a rule of thumb, as every suggestive identification case must be tested under the "totality of the circumstances" standard of Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Simmons, supra 390 U.S. at 383, 88 S.Ct. 967; Neil, supra 409 U.S. at 196, 93 S.Ct. 375.

The circumstances surrounding the Buotes' selection of appellant's photo were less conducive to misidentification than those in Fowler and United States v. Workman, 470 F.2d 151 (4th Cir. 1972). Since the Buotes had already been shown a spread of photographs after the crime, the showing of one more photo on the morning of October 1 was to some extent a continuation of an ongoing process of looking through police photos. We held a somewhat similar train of events "not . . . unduly suggestive" in Cooper v. Picard, 428 F.2d 1351 (1st Cir. 1970). This is not to say that viewing the earlier photos did more than reduce the suggestive force inherent in the Lawrence officers' actions; it does not by itself remove the problem. But, weighing this factor with those which tend to support the validity of the Buote identifications, we are of the opinion that the likelihood of misidentification was not so great as to justify invalidation of appellant's conviction.

Both Buotes had seen the murderer at close range, in good light, and in a situation likely to fix his image firmly in their minds. They did not select any photos from the spread presented to them the night of the murder, indicating both that they had a sufficiently good recollection of the assailant's features to distinguish him from others and that they were not overly predisposed to produce a suspect for the police. In her description to the police Diane described the murderer as having something unique about his eyes, a feature which her mother had not observed. This tends to show both the extent of Diane's observation of the man and her ability to recall what she had seen. Mrs. Buote's ability to construct a sketch of the murderer the next day shows to some extent the detail of her recall; and as this was introduced into evidence along with the photo which the Buotes later identified, the jury could compare the sketch, the photo, and appellant's features as seen in the courtroom in order to assess the accuracy of the Buote identifications. Finally, the identification which the Buotes made occurred only two days after the crime at a time when their memory of the assailant should still have been relatively fresh.

All of the above are factors which the Supreme Court has indicated are to be ***802** considered in evaluating the likelihood of misidentification. Neil, supra 409 U.S. at 199-200, 93 S.Ct. 375. In addition, they serve to distinguish this case from Kimbrough v. Cox, 444 F.2d 8 (4th Cir. 1971), upon which appellant heavily relies. There, two weeks after the crime, the witnesses were shown photos only of the defendant, in circumstances which the court of appeals said made it "obvious that Kimbrough was the only suspect." 444 F.2d at 10.[3] In the instant case Mrs. Buote testified that the Lawrence officers asked only if she would look at the photo they brought with them. On cross-examination defense counsel and Mrs. Buote had the following colloquy:

"Q. When the officer presented to you one photograph did you suspect or believe that this man had been singled out for some reason?
A. No.

Q. You did not?

A. No.

Q. You didn't see anything at all odd about it?

A. No.

Q. And did you make a decision there and then from the photograph alone that this was the man you had seen?

A. Did I make a decision then?

Q. Yes.

A. That was the picture of the man that I saw "

After she had identified appellant's photo as the murderer, Mrs. Buote called for Diane, who was asleep, to come down. Mrs. Buote testified that she introduced Diane to the officers and then left the room without indicating anything to her daughter concerning her identification of the photo. Diane's testimony confirmed this, and she said that the officers had not said anything to her about the picture, that they just presented it to her for examination. Asked whether she thought at the time that the officers had caught the murderer, Diane replied she could not remember.

The version of events that morning thus painted by Diane and her mother was consistent with the testimony of the two Lawrence police officers. Thus, the record establishes that other than in their use of the single photo (and possibly in arriving so early), the officers did nothing else which could be characterized as impermissibly suggestive. As we reject appellant's contention that these defects alone, viewed against all the circumstances of the case, created "a very substantial likelihood of misidentification," we think the petition for habeas corpus was rightly dismissed.[4]

Affirmed.

All Citations

519 F.2d 798

Footnotes

1 An automobile fitting this description was later found abandoned. Investigation revealed that it had been stolen the morning of the murder.

2 The Simmons test, devised to deal with the possibility of prejudice from an in-court identification of a defendant following suggestive police procedures, focused upon the danger of "irreparable misidentifications." The Neil Court said that "with the deletion of 'irreparable' (the Simmons formulation) serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself." 409 U.S. at 198, 93 S.Ct. at 381 (footnote omitted). As both types of identification evidence were presented to the jury in this case, both standards would seem applicable. However, since we conclude that the procedures here did not create a very substantial likelihood of misidentification, there is no need to go beyond the Neil standard.

3 Police attention had been drawn to Kimbrough through an accusatory phone call from his estranged wife, who had supplied the photos used in the identification. The court, describing this as "the very unusual way in which the police focused upon Kimbrough," felt that his identification was therefore additionally suspect because "the decision to present Kimbrough as the only suspect was based on rather flimsy suspicion." Appellant argues that the Lawrence officer's "hunch" selection of his photograph can be equated with Mrs. Kimbrough's actions, but even if this were so nothing has been suggested to us indicating that this factor could have affected the accuracy of the Buotes' identification of that photo.

4 Appellant appears to make a separate argument that the refusal by the trial court to grant his request for a voir dire prior to admitting the identification testimony of the Buotes constitutes a ground for reversing his conviction. While the holding of a voir dire upon a claim of suggestive identification would have been eminently sensible practice to prevent the jury from hearing material which might later be determined inadmissible, the failure to grant such a request does not on this record amount to constitutional error. The facts relevant to the suggestiveness of the display could be explored at the trial in the presence of the jury without undue prejudice to Nassar; and the state court and now the federal courts are in a position to rule on the constitutional claim as if a hearing had originally been held outside the jury's presence.

90 Misc.2d 195
Supreme Court, New York County, New York,
Part 101.

The PEOPLE of the State of New York
v.
Jackie EVANS, Defendant.

April 15, 1977.

Synopsis

On motion of defense counsel for permission to attend voice print identification procedure, the Supreme Court, E. Leo Milonas, J., held that no reason exists why a defendant's lawyer should not, if he chooses, be permitted to attend, strictly as a nonparticipant, a voice print identification procedure.

Motion granted.

Attorneys and Law Firms

****675** Robert M. Morgenthau, Dist. Atty., New York County by Diane Kemelman, Asst. Dist. Atty., for the People.

***196** Gerald Zwirn, New York City, for defendant.

Opinion

E. LEO MILONAS, Justice:

The defendant was indicted on June 21, 1976 for the crimes of reckless endangerment in the first degree, criminal mischief in the fourth degree and discharge of a firearm, in violation of Penal Law secs. 120.25 and 145.00 and Administrative Code sec. 436—5.0c. In the course of pretrial motions, the court granted the People's petition for an order dircting the defendant to submit to the taking of a voice exemplar. Defense counsel then moved for permission to attend the voice print identification procedure, a request which the prosecution opposes. It is the district attorney's contention that the presence of a defendant's lawyer at a pretrial confrontation is required only where there is a high potential of suggestion inherent in the manner in which the witness views the suspect, as in a lineup. In the instant situation, the People argue, there is a minimal likelihood of prejudice since the witness is himself an attorney and a member of the District Attorney's office, and, presumably, there is a distinction between a corporeal identification and the taking of a voice print.

The Fifth Amendment's privilege against self-incrimination extends only to evidence of a testimonial or communicative nature. It does not protect an accused from the compulsory display of measurable or identifiable physical characteristics. Thus, an individual can be forced to exhibit his body (Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411, and United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149), to furnish blood specimens (Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908), and to supply handwriting (Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967)), or voice (United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67) exemplars. See also, People v. Rogers, 86 Misc.2d 868, 385 N.Y.S.2d 228; People v. Mineo, 85 Misc.2d 919, 381 N.Y.S.2d 179, and People v. Allah, 84 Misc.2d 500, 376 N.Y.S.2d 399, granting the People's request for, respectively, defendant's voice sample, palm prints and dental impressions.

On such occasions, there is no general right to counsel; it attaches only when the criminal action is at a 'critical' stage. In United States v. Wade, supra, the United States Supreme ***197** Court distinguished between a pretrial lineup with its grave possibility of prejudice and such other preparatory procedures as the taking of fingerprints, blood specimens, clothing and hair. The latter, the court stated, were not critical stages since there was little risk that the absence of a lawyer would threaten the defendant's right to a fair trial. See also Gilbert v. California, supra; and United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619; People v. Coles, 34 A.D.2d 1051, 312 N.Y.S.2d 621, and People v. Spinks, 37 A.D.2d 424, 326 N.Y.S.2d 261, which held that the Sixth Amendment does not require that an attorney be allowed to observe a photographic array, even one conducted after indictment.

However, while there may be no violation of an accused's constitutional rights in not having his lawyer present at all pretrial investigatory examinations, it is a frequently repeated proposition that once a criminal action has commenced, a defendant is entitled to the assistance of counsel at every stage of the proceeding against him. People v. Blake, 35 N.Y.2d 331, 361 N.Y.S.2d 881, 320 N.E.2d 625; People v. Waterman, 9 N.Y.2d 561, 216 N.Y.S.2d 70, 175 N.E.2d 445; People v. Di Biasi, 7 N.Y.2d 544, 200 N.Y.S.2d 21, 166 N.E.2d 825; People v. Loiacono, 40 A.D.2d 856, 337 N.Y.S.2d 870; People v. Abdul Karim Alkanani, 31 A.D.2d 838, 298 N.Y.S.2d 275, ****676** aff'd 26 N.Y.2d 473, 311 N.Y.S.2d 846, 260 N.E.2d

496; and People v. Shaver, 26 A.D.2d 735, 272 N.Y.S.2d 175, appeal after remand 31 A.D.2d 673, 295 N.Y.S.2d 764. Certainly, this court perceives no reason why the defendant's lawyer should not, if he chooses, be permitted to attend, strictly as a non-participant, the voice print identification. See People v. Longo,74 Misc.2d 905, 347 N.Y.S.2d 321, which permitted defense counsel to sit in on the removal of his client's sample scalp, facial and pubic hairs. See also Matter of Lee v. County Court, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 (right to counsel at pre-trial psychiatric examination). A subsequent motion for suppression based upon an improperly suggestive voice identification is not inconceivable. In fact, in People v. Singleton, 83 Misc.2d 112, 370 N.Y.S.2d 359, the court was confronted with that very issue and did, indeed, grant the defendant's request for a hearing.

Consequently, the defendant's motion is granted. The district attorney is hereby ordered to notify counsel of the time and place of the identification so that he may be present.

All Citations

90 Misc.2d 195, 393 N.Y.S.2d 674

89 Ill.2d 171
Supreme Court of Illinois.

The PEOPLE of the State of Illinois, Appellant,

v.

Stanley A. LIPPERT, Appellee.

No. 54682.
|
Feb. 19, 1982.

Synopsis

Defendant was convicted before the Circuit Court, Fulton County, U. S. Collins, J., of armed robbery, and he appealed. Following remand, 93 Ill.App.3d 273, 41 Ill.Dec. 751, 415 N.E.2d 1064, State petitioned for leave to appeal, which was granted. The Supreme Court, Underwood, J., held that: (1) defendant was constitutionally arrested when placed in squad car and taken to scene of showup identification; (2) subsequent transportation of defendant for short distance for purposes of showup was legitimate investigatory procedure; (3) showup identification was admissible in evidence; and (4) in-court identification of defendant was properly admitted.

Appellate Court reversed; Circuit Court affirmed.

Attorneys and Law Firms

***174 **606 ***820** Tyrone C. Fahner, Atty. Gen., Chicago, and Thomas J. Homer, State's Atty., Lewistown (John X. Breslin, Deputy Director and Gary F. Gnidovec, Staff Atty., State's Attorneys Appellate Service Commission, Ottawa, of counsel), for the People.

Robert Agostinelli, Deputy State Appellate Defender and Frank W. Ralph, Asst. State Appellate Defender, Ottawa, for appellee.

Opinion

UNDERWOOD, Justice:

At the conclusion of a bench trial in the circuit court of Fulton County defendant, Stanley Lippert, was found guilty of the armed robbery of two elderly couples and was sentenced to a term of six years' imprisonment. A divided appellate court held that a showup identification of defendant by the robbery victims and a subsequent confession should have been suppressed and remanded the cause for a new trial. (93 Ill.App.3d 273, 41 Ill.Dec. 751, 415 N.E.2d 1064.) That court held that Terry v. Ohio (1968), 393 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, provided insufficient basis for the detention and transportation of the defendant to the site of the showup. We granted the State's petition for leave to appeal.

At the hearing on the motion to suppress, a deputy sheriff, Sergeant Daniel Dugan, testified that he responded to a call from the Riverview Inn, Liverpool, Illinois, about 11 p.m., November 5, 1979. There he interviewed the complainants, Mr. and Mrs. Raymond Morse and Mr. and Mrs. Charles Scott, who told him that they had been robbed at gunpoint by four young men about 25 minutes earlier. The robbery occurred on the Liverpool road, the only northbound route out of town, at a point about one-half mile south of Illinois route 24. This was two to three miles from the Inn. The Morses' car had developed engine trouble, and they had pulled to the side of the road. The ***175** victims had flagged down an approaching car containing four young men and asked for assistance. After tinkering with the engine for a few minutes, one of the men, later identified as defendant, obtained a rifle from their car, pointed it at the victims and announced the robbery. About $30 was taken. The robbers then got back in their car and left, headed northward.

According to Deputy Dugan's testimony, one of the robbers was described to him as about 5 feet 11 inches in height with medium length blond hair, and another as having bushy brown hair and wearing a blue jacket.

The deputy testified that he requested the Morses and Scotts to remain at the Inn while he checked the area. He then proceeded northward on the Liverpool road and within a few minutes received a radio message from another deputy that a car was approaching him from the rear. At a point between Morse's car and route 24, he backed his squad car into a driveway so that his bright lights would shine onto the road and across traffic. He saw a car without license plates approaching, and observed that the driver had medium length light brown hair and the passenger had bushy hair and was wearing a blue coat. He testified that the two matched the descriptions given him. The car passed at about 30 miles per hour and he followed, stopping the car at the route 24 intersection. When he approached the car he saw that it had a temporary registration certificate taped on the passenger side of the windshield. Defendant, who had been driving, identified himself by presenting a uniform traffic citation in lieu of a driver's license. He and his passenger, William Long,

were frisked, Deputy Dugan noting that defendant had light brown hair and was about 5 feet 11 inches tall.

Defendant and Long were taken back to the Liverpool Inn, defendant in Deputy Dugan's squad car and Long in another squad **607 ***821 car which had arrived after the stop. Deputy Dugan read defendant his Miranda rights during this trip *176 and defendant acknowledged he understood them. However, defendant denied knowing anything about the robbery. They arrived at the Riverview Inn about 55 minutes after the robbery. Mrs. Morse came out and identified defendant and Long, who were sitting in the squad cars in which each had arrived. Mrs. Morse told Deputy Dugan that defendant had complained about a cut finger during the robbery, and, upon checking defendant's hands, Dugan found that defendant had stitches in his little finger. Mr. Morse then came out and identified defendant as the robber who held the rifle.

Deputy Dugan questioned defendant at this time and defendant told him that two others, Darrell Brazee and Richard Sale, had committed the robbery while he sat in the car. After the robbery, Brazee and Sale were dropped off near Brazee's house in Liverpool, where they were going " 'coon hunting." They had taken the .22 rifle with them. Defendant was handcuffed and driven to an area near Brazee's home. After about 25 minutes Brazee and Sale were arrested as they emerged from a wooded area. They were carrying a flashlight and a .22 rifle. The four were then taken to the county jail, about 20 minutes away.

Defendant, Sale and Brazee each gave short written statements that night admitting their participation in the robbery. (Long, who was 16, was turned over to juvenile authorities.) The following morning more detailed statements were tape recorded and later transcribed. The three confessions corroborated each other in almost all respects. There is no contention here that Miranda warnings were inadequate or that the confessions were involuntary. The other witnesses called by the State at the motion hearing testified to the Miranda warnings and as witnesses to the statements. Defendant testified, contrary to the State's witnesses, that he was handcuffed before the showup. He also stated that he had been drinking that night.

The trial court denied the motion to suppress, finding *177 that the confessions were voluntarily given and that Deputy Dugan "had probable cause to stop the car" because of the lack of license plates and because of his "identification of these two individuals being possibly involved in the robbery according to the description which he had been furnished." It was then stipulated that the testimony at trial would be the same as at the hearing on the motion to suppress and that defendant had been identified by the Morses and Scotts, both at the Inn and in court. The confessions were also admitted. The only additional witness called at trial testified that the defendant had been read his Miranda rights before he confessed. Defendant renewed his motion to suppress but offered no other evidence, and a judgment of guilty was entered.

There is, of course, no doubt that the absence of license plates justified the initial stop of defendant's car. The determination that the temporary registration was valid, however, eliminated the absence of license plates as authority for defendant's further detention, and that authorization must be found, if at all, in the existence of probable cause to arrest defendant or under Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. While one member of the appellate court stated that the State had there conceded the absence of probable cause, that conclusion is now disputed by the State, which indicates it believed the trial court's denial of the motion to suppress was predicated on Terry and accordingly focused its argument upon that issue.

Defendant, however, argues that even if the initial stop was valid under Terry, his subsequent detention and transportation must be supported by nothing less than probable cause to arrest. Since, defendant contends, the facts known to Deputy Dugan at the time of the stop do not constitute probable cause for arrest, the initial identification and subsequent confession should have been suppressed.

Whether there was probable cause for arrest is a mixed question of law and fact. (*178 **608 ***822 People v. McGowan (1953), 415 Ill. 375, 380, 114 N.E.2d 407; People v. Roberta (1933), 352 Ill. 189, 193, 185 N.E. 253; 5 Am.Jur.2d Arrest s 49 (1962).) The facts and circumstances of the stop and detention of the defendant were fully developed at the hearing on the motion to suppress and are uncontroverted. Although the trial court found only that Deputy Dugan had probable cause to stop and did not make a finding on the issue of probable cause to arrest, there appears to be no reason why the remaining question of law may not be determined here. (Cf., People v. Kalpak (1957), 10 Ill.2d 411, 425-26, 140 N.E.2d 726 (where the question of defective warrant was avoided by finding that probable cause to arrest without warrant was established); see also State v. Byers

(1975), 85 Wash.2d 783, 539 P.2d 833.) The question here is a close one, but we believe that Deputy Dugan had probable cause to arrest the defendant and Long, for armed robbery, following the stop.

Probable cause for arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense. (People v. Creach (1980), 79 Ill.2d 96, 101, 37 Ill.Dec. 338, 402 N.E.2d 228, cert. denied (1980), 449 U.S. 1010, 101 S.Ct. 564, 66 L.Ed.2d 467; People v. Robinson (1976), 62 Ill.2d 273, 342 N.E.2d 356; People v. Clay (1973), 55 Ill.2d 501, 304 N.E.2d 280; see also Brinegar v. United States (1949), 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Carroll v. United States (1925), 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543.) Although a "mere suspicion" that the person arrested has committed the offense is an insufficient basis for arrest (see Henry v. United States (1959), 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479), evidence sufficient to convict is not required (People v. Marino (1970), 44 Ill.2d 562, 573, 256 N.E.2d 770; People v. Macias (1968), 39 Ill.2d 208, 213, 234 N.E.2d 783, cert. denied (1969), 393 U.S. 1066, 89 S.Ct. 721, 21 L.Ed.2d 709; People v. Fiorito (1960), 19 Ill.2d 246, 253, 166 N.E.2d 606, cert. denied ***179** (1960), 364 U.S. 870, 81 S.Ct. 113, 5 L.Ed.2d 93.)

Because, as Professor LaFave points out in his treatise on the law of search and seizure, an arrest not only serves the function of producing persons for prosecution but also serves an investigative function, courts have not ruled that an arrest can occur only when the known facts indicate that it is more probable than not that the suspected individual has committed the crime. (1 W. LaFave, Search and Seizure s 3.2, at 478-85 (1978), noting in particular the position taken in the Model Code of Pre-Arraignment Procedure 14 (Proposed Official Draft 1975).) Professor LaFave also suggests that a "more probable than not" test might be more appropriate if the question was whether the officer knew that a crime had been committed:

> "(T)he probable cause test is a 'compromise' for accommodating the 'often opposing interests' of privacy and law enforcement. The compromise might well be struck somewhat differently in cases where the uncertainty is whether any crime has occurred, for it appears that the privacy and law enforcement interests ought to be weighed somewhat differently in that context. For one thing, it would seem that privacy is threatened less by permitting less than a 50% probability as to the identity of an offender than it is by permitting something short of more-probable-than-not as to the existence of criminal activity. As to the former, the existence of known criminal activity serves to provide an anchor or touchstone, in a time-space sense, which limits the police arrest authority. Police will not continually be arresting upon a less than 50% probability of guilt, but only in limited situations where a person is found in an area where it is known a crime has recently occurred. By contrast, if the police may also arrest upon a less than 50% probability that a crime has even occurred, then this would open up the possibility that police would generally arrest persons engaged in activity which was only equivocal. The latter practice, ****609** *****823** it seems fair to assume, would result in ***180** many more intrusions into the freedom and privacy of innocent persons than would the former.
>
> By the same token, the law enforcement need for allowing arrests upon a less than 50% probability of crime is not as great as the need to permit arrests upon a less than 50% probability that the arrestee is the person who committed a known crime. As discussed earlier, the latter situation commonly involves police action taken in response to a recent serious crime, such as murder, armed robbery or burglary, where experience has shown that the chances of apprehending the offender are slight unless he is caught in the vicinity of the crime." 1 LaFave, Search and Seizure s 3.2, at 484-85 (1978).

At the time Deputy Dugan stopped defendant's car he knew that an armed robbery had recently been committed. He was provided with a description of the robbers, and, immediately, within 30 to 35 minutes of the robbery, began to search the area for the robbers. Although some of the descriptions given by the victims were rather general, the rural area surrounding the small community of Liverpool was sparsely populated (Deputy Dugan referred to it as "desolate"), the Liverpool road was lightly traveled (defendant's car was the only one seen by Dugan on the road), and it was late at night. Under these circumstances, the number of individuals in that area who might be expected to fit these descriptions, particularly the blue-jacket and bushy-hair portions, was sufficiently limited to avoid arbitrary or wholesale arrests. Cf., Commonwealth v. Jackson (1975), 459 Pa. 669, 331 A.2d 189, and Commonwealth v. Richards (1974), 458 Pa. 455, 327 A.2d 63, where general descriptions in more populated areas were held too general to support arrest; see also Wong

Sun v. United States (1963), 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, and Mallory v. United States (1957), 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479, where the general nature of information available to arresting officers was held to be insufficient.

***181** Deputy Dugan testified that he was searching for one to four young, white males who would fit the descriptions. Both defendant and Long fit them reasonably close. Defendant was also in the area of the robbery within a short time after its occurrence. Although defendant argues that this fact cuts against the existence of probable cause, in that robbers would be expected to be far away 30 minutes later, such a holding would require that searches for suspects take place only at the fringes of the area. Since there was no indication that the robbers were nonresidents of the area, it seems to us not illogical to expect that they might still be in the vicinity. While it is arguable that defendant had been coming from an unexpected direction, the fact remains that he was within the area in which a search could reasonably be conducted.

Clearly Deputy Dugan had sufficient cause to stop the car for investigative purposes, either on the grounds of his observation that its occupants seemed to match the descriptions he was given or that the car was without license plates. Upon a closer view of defendant, the deputy also observed that defendant matched the height description, and that Long, with his more distinctive bushy hair and blue jacket, fit the description rather well. The combination of two suspects, both fitting the descriptions, is another factor to be considered in determining the probabilities involved in the determination of "probable" cause. Under all of the circumstances present here we believe Deputy Dugan had probable cause to believe that defendant and Long were two of the robbers for whom he was looking. We hold, therefore, that defendant was constitutionally arrested when he was placed in the deputy's squad car and taken back to Riverview Inn.

While we have determined that probable cause to arrest existed at the time defendant was placed in the deputy's squad car, we also consider the transportation of the defendant the short distance involved here for purposes of a ***182** showup to have been ****610** *****824** a legitimate investigatory procedure even if one considers the grounds to have been less than probable cause to arrest. The line of demarcation between a legitimate seizure of a suspect on less than probable cause in a Terry stop and an impermissible seizure, tantamount to a full-blown arrest on less than probable cause as described in Dunaway v. New York (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, is not completely clear. It appears to us, as the State argues in this case, that a middle ground can exist wherein an investigatory procedure, such as an immediate showup, can be employed by officers acting on somewhat less than probable cause to arrest.

In Terry v. Ohio (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, Sibron v. New York (1968), 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917, and Adams v. Williams (1972), 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612, the Supreme Court carved out a limited exception to the fourth amendment requirement that seizures of persons be based upon probable cause. Although much of the court's concern in these cases was with the scope of a search of the person incidental to the stop, it was recognized that the purpose of the stop itself was to investigate the "articulable suspicions" of the officer that the person stopped had committed or was about to commit a crime. (Terry v. Ohio (1968), 392 U.S. 1, 22-23, 30, 88 S.Ct. 1868, 1880-81, 1884, 20 L.Ed.2d 889, 907, 911; see 3 W. LaFave, Search and Seizure s 9.2 (1978).) In many cases following Terry, courts refused to limit investigative technique to simple questioning of the suspect, but rather recognized that legitimate, efficient police work, under certain circumstances, might require either detention until witnesses could arrive who might provide positive identification or transportation of the suspect to those witnesses. (See, e.g., cases collected at 3 W. LaFave, Search and Seizure s 9.2, at 44 n.93 (1978); see also United States v. Nieves (2d Cir. 1979), 609 F.2d 642; ***183** United States v. Esposito (E.D. New York 1980), 484 F. Supp. 556; Commonwealth v. Lovette (1979), 271 Pa.Super. 250, 413 A.2d 390; but see People v. Harris (1975), 15 Cal.3d 384, 540 P.2d 632, 124 Cal.Rptr. 536.) The rationale of these cases was, apparently, that a short period of detention was only minimally intrusive when compared to the benefit of immediate investigation.

Defendant argues, however, that the decisions in Davis v. Mississippi (1969), 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676, Brown v. Illinois (1975), 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416, and Dunaway v. New York (1979), 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824, require probable cause to arrest before he may be transported from the site of the stop. In Dunaway the defendant was "picked up" on the strength of an informant's tip for questioning in regard to a robbery/murder that had taken place several months before. He was brought to police headquarters and interrogated. The court, in holding that he had been seized unlawfully on less than

probable cause, rejected the State's argument that this police action was reasonable under the circumstances. In reaching this conclusion the court reviewed its holdings in both Davis and Brown, concluding:

> "(C)ustodial interrogation-regardless of its label-intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation." (442 U.S. 200, 216, 99 S.Ct. 2248, 2258, 60 L.Ed.2d 824, 838.)

See Comment, Custodial "Seizures" and the Poison Tree Doctrine: Dunaway v. New York and its Aftermath, 13 J. Marshall L.Rev. 733, 748 (1980), concluding, in part, that the court thus rejected "any standard short of probable cause for an involuntary custodial interrogation, no matter how exceptional the circumstances."

The court has quite clearly held that in the context of ***184** the police activity in Dunaway, Brown and Davis probable cause is the balance between society's interest in catching criminals and the individual's liberty ****611** *****825** interest. However, in the case before us, we are presented with police conduct, substantially less intrusive than that in Dunaway and Brown and in a markedly different context. In Dunaway, Brown and Davis the seizure occurred long after the crime. Deputy Dugan, in contrast, was conducting a field investigation within just a few minutes of the crime. The stop of defendant occurred no more than 35 minutes after the robbery and very close to the scene of the crime. In the context of the time and place of the stop, late night on a virtually deserted country road, considering that both defendant and his passenger fit the descriptions given him by the victims, considering that simple questioning was inadequate to produce further information, considering that the victims, who were only a few minutes away, could immediately confirm or deny the identification of the suspects as the robbers, and, perhaps most importantly in view of Terry and Dunaway, considering that the transportation of defendant to the inn was not significantly more intrusive upon his liberty than detaining him to await arrival of the victims, we believe that the circumstances are much closer to those of a permissible stop under Terry and Adams than the impermissible station house, custodial questioning tantamount to a full blown arrest in Brown and Dunaway.

Faced with what appears to be a hard rule of probable cause in Dunaway, several Federal courts have refused to approve anything more than a Terry-stop absent probable cause. However, most of those cases differ, in important respects, from ours. In United States v. Chamberlin (9th Cir. 1980), 644 F.2d 1262, a 20-minute detention in a police car was held to exceed permissible limits; significantly, however, although the stop was valid under Terry, the police had only suspicions that a crime had been committed. ***185** United States v. Tookes (5th Cir. 1980), 633 F.2d 712, held that detention while officers searched for evidence of crime based only on suspicious activity of suspect was an impermissible arrest. United States v. Hill (5th Cir. 1980), 626 F.2d 429, held that a seizure based only on an anonymous tip that a drug deal was being made, where the defendant fit the description given by the informant, was an impermissible seizure under Dunaway; United States v. Tucker (2d Cir. 1979), 610 F.2d 1007, held that detention in a "holding pen" for several hours where the defendant was picked up as a suspect in a bank robbery the day after crime was impermissible under Dunaway. United States v. Perez-Esparza (9th Cir. 1979), 609 F.2d 1284, held that holding a suspect for three hours at a border checkpoint based in an informant's tip that he was carrying drugs was a violation of Dunaway. United States v. Williams (8th Cir. 1979) 604 F.2d 1102, held that probable cause was necessary to take the defendant to the police station.

More recently, however, the apparently hard rule of Dunaway that seizures of persons be supported by probable cause was softened somewhat in Michigan v. Summers (1981), 452 U.S. 692 101 S.Ct. 2587, 69 L.Ed.2d 340. There defendant was detained by police upon grounds less than probable cause, while they searched a house for narcotics pursuant to a search warrant. The court found this detention was substantially less intrusive than that of Dunaway. Significantly, the court, in reviewing its holdings in Terry, Adams and other "stop" cases, noted: "In these cases, as in Dunaway, the Court was applying the ultimate standard of reasonableness embodied in the Fourth Amendment. * * * (T)hey demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in Terry and Adams." (Emphasis added.) 452 U.S. 692, 699-700, 101 S.Ct. 2587, 2592-93, 69 L.Ed.2d 340, 348.

In addition, cases from other jurisdictions, on facts ***186** much closer to those here, which have approved similar police conduct. In State v. Fauria (La.1981), 393 So.2d 688,

a detention of suspects at the site of the stop to await arrival of policeman who could identify suspected stolen goods was held a reasonable investigatory stop. In **612 ***826 State v. Merklein (Fla.App.1980), 388 So.2d 218, a detention of the defendant for 20 to 40 minutes pending the arrival of robbery victims and witnesses, where the stop occurred soon after the robbery, was held to be reasonable without citing either Terry or Dunaway. In District of Columbia v. M. M. (D.C.App.1979), 407 A.2d 698, where defendants fitting descriptions of robbers were stopped 25 minutes after a robbery, a short transportation for a showup to eyewitness was held not to be an unreasonable intrusion. (See also Wilkerson v. United States (D.C.App.1981), 427 A.2d 923.) In a recent update of the treatise, Professor LaFave suggests Dunaway does not rule out transportation of a suspect for purposes of a showup.

> "It may be said, of course, as to the situation presently under discussion, that again there is an additional circumstance not present in Terry or related cases decided by the Supreme Court under the balancing test: the suspect is not dealt with only at the place 'where he was found,' but instead is 'transported' elsewhere. But that alone, it is submitted, does not make the detention 'in important respects indistinguishable from a traditional arrest.' It is certainly much closer to a traditional stop under Terry, as the suspect is moved a short distance, is not confined in a police station, and is subjected to investigative techniques (almost always viewing by an eyewitness) with a high potential for promptly clearing or inculpating the suspect." 3 W. LaFave, Search and Seizure s 9.2, at 6 n.93.3 (1981 Supp.).

In many, if not most, of the cases in which Dunaway has been cited as controlling the decision to hold impermissible certain investigative activities short of custodial interrogation, *187 the stop by police occurred before they knew that a crime had been committed. As Professor LaFave suggests is appropriate, courts have been more protective of individual liberty interests where it is not known that a crime has been committed than where the stop occurs during the period of an immediate investigation of a known crime. This distinction appears to be sound. We do not believe that the court in Dunaway intended to eliminate effective and only minimally intrusive investigative techniques employed by police in the immediate search for the perpetrators of serious crime. In Adams v. Williams, Justice Rehnquist, speaking for a majority of the court, said:

> "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response." (407 U.S. 143, 145, 616-17, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612.)

As the court noted in Mapp v. Ohio (1961), 367 U.S. 643, 657, 81 S.Ct. 1684, 1693, 6 L.Ed.2d 1081, 1091, "(t)here is no war between the Constitution and common sense." We believe that common sense approves, and the fourth amendment does not condemn, the actions of Deputy Dugan, regardless of the existence of probable cause.

Nor do we believe that section 107-14 of the Code of Criminal Procedure of 1963 (Ill.Rev.Stat.1979, ch. 38, par. 107-14), which codified Terry (People v. Lee (1971), 48 Ill.2d 272, 279, 269 N.E.2d 488), prohibits the limited transportation of this defendant for the showup purposes. In the sparsely populated rural area where defendant was stopped late at night, the Riverview Inn, two to three miles away, was in our opinion within "the vicinity" of the stop as that phrase was legislatively intended. Similarly, the few minutes required for transportation there did not prolong the stop beyond the "reasonable period of time" permitted by the statute.

*188 It remains to be decided whether the showup identification was admissible. This court has approved prompt showups near the scene of the crime as acceptable police procedure designed to aid police in determining whether to continue or to end the search for the culprits. (People v. McKinley (1977), 69 Ill.2d 145, 13 Ill.Dec. 13, 370 N.E.2d 1040, cert. denied **613 ***827 (1978), 435 U.S. 975, 98 S.Ct. 1623, 56 L.Ed.2d 69; see also People v. Bey (1972), 51 Ill.2d 262, 281 N.E.2d 638; People v. Higgins (1972), 50 Ill.2d 221, 278 N.E.2d 68 cert. denied (1972), 409 U.S. 855, 93 S.Ct. 195, 34 L.Ed.2d 100; People v. Elam (1972), 50 Ill.2d 214, 278 N.E.2d 76. The admissibility of the evidence of a showup identification depends upon the reliability of that identification. (Manson v. Brathwaite (1977), 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140; People v. McKinley (1977), 69 Ill.2d 145, 13 Ill.Dec. 13, 370 N.E.2d 1040.) Applying to the showup at the Riverview Inn the factors suggested in Manson and McKinley, we find that during the course of the robbery Mrs. Morse was out of her car, talked to the robbers and had ample time to view defendant and others for a period of several minutes. Mr.

Morse, although he was seated in the back seat of the car, also had ample opportunity to view the defendant before the robbery and had a much closer view when defendant held the rifle just a few inches from his head. The Morses appear to have been attentive to the robbers and provided an initial description that, although concededly somewhat general as to some, was reasonably accurate. Mrs. Morse, who came out of the Inn first and alone, promptly and positively identified defendant as the robber. Additionally she volunteered the information about the cut finger which was verified by Deputy Dugan's inspection of defendant's hands. Mr. Morse came out after this, and, immediately, apparently without talking to his wife, identified defendant as the person who held the rifle. A relatively short time, no more than 55 minutes, had elapsed between the robbery and the showup. In view of these factors we are satisfied that the showup identifications were sufficiently reliable to permit them to be introduced ***189** as evidence. Given the validity of the arrest and the admissibility of the showup identifications as evidence, there is no question that the in-court identification of defendant was also properly admitted. See, e.g., United States v. Crews (1980), 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537.

Accordingly, we find no error in the proceedings of the trial court. The judgment of the appellate court is reversed, and the judgment of the circuit court of Fulton County is affirmed.

Appellate court reversed; circuit court affirmed.

All Citations

89 Ill.2d 171, 432 N.E.2d 605, 59 Ill.Dec. 819

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86 S.Ct. 1826
Supreme Court of the United States

Armando SCHMERBER, Petitioner,

v.

STATE OF CALIFORNIA.

No. 658.
|
Argued April 25, 1966.
|
Decided June 20, 1966.

Synopsis

Petitioner was convicted in the Los Angeles Municipal Court of criminal offense of driving an automobile while under influence of intoxicating liquor and he appealed. The Appellate Department of the California Superior Court affirmed and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that evidence of analysis of petitioner's blood taken over his objection by physician while petitioner was in hospital, after being arrested, was not inadmissible on ground that it violated Fifth Amendment privilege against self-incrimination and that taking of blood did not violate petitioner's right under Fourth Amendment to be free of unreasonable searches and seizures.

Affirmed.

Mr. Chief Justice Warren, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Fortas dissented.

Attorneys and Law Firms

****1829** ***758** Thomas M. McGurrin, Beverly Hills, Cal., for petitioner.

Edward L. Davenport, Los Angeles, Cal., for respondent.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

Petitioner was convicted in Los Angeles Municipal Court of the criminal offense of driving an automobile while under the influence of intoxicating liquor.[1] He had been arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving.[2] At the direction of a police officer, a blood sample was then withdrawn from petitioner's body by a physician at the hospital. ***759** The chemical analysis of this sample revealed a percent by weight of alcohol in his blood at the time of the offense which indicated intoxication, and the report of this analysis was admitted in evidence at the trial. Petitioner objected to receipt of this evidence of the analysis on the ground that the blood had been withdrawn despite his refusal, on the advice of his counsel, to consent to the test. He contended that in that circumstance the withdrawal of the blood and the admission of the analysis in evidence denied him due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights secured against the States by that Amendment: his privilege against self-incrimination under the Fifth Amendment; his right to counsel under the Sixth Amendment; and his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. The Appellate Department of the California Superior Court rejected these contentions and affirmed the conviction.[3] In view of constitutional decisions ****1830** since we last considered these issues in Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448—see Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977;Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, and Mapp v. State of Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081—we granted certiorari. 382 U.S. 971, 86 S.Ct. 542, 15 L.Ed.2d 464. We affirm.

I.

THE DUE PROCESS CLAUSE CLAIM.

Breithaupt was also a case in which police officers caused blood to be withdrawn from the driver of an automobile involved in an accident, and in which there was ample justification for the officer's conclusion that the driver was under the influence of alcohol. There, as here, the extraction was made by a physician in a simple, medically acceptable manner in a hospital environment. ***760** There, however, the driver was unconscious at the time the blood was withdrawn and hence had no opportunity to object to the procedure. We affirmed the conviction there resulting from the use of the test in evidence, holding that under such circumstances the withdrawal did not offend 'that 'sense of justice' of which we spoke in Rochin v. (People of) California, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.' 352 U.S., at 435, 77 S.Ct. at 410. Breithaupt thus requires the rejection of petitioner's due

process argument, and nothing in the circumstances of this case[4] or in supervening events persuades us that this aspect of Breithaupt should be overruled.

II.

THE PRIVILEGE AGAINST SELF-INCRIMINATION CLAIM

Breithaupt summarily rejected an argument that the withdrawal of blood and the admission of the analysis report involved in that state case violated the Fifth Amendment privilege of any person not to 'be compelled in any criminal case to be a witness against himself,' citing Twining v. State of New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97. But that case, holding that the protections of the Fourteenth Amendment do not embrace this Fifth Amendment privilege, has been succeeded by Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653. We there held that '(t)he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, ***761** and to suffer no penalty * * * for such silence.' We therefore must now decide whether the withdrawal of the blood and admission in evidence of the analysis involved in this case violated petitioner's privilege. We hold that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature,[5] and that the withdrawal of ****1831** blood and use of the analysis in question in this case did not involve compulsion to these ends.

It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege. The critical question, then, is whether petitioner was thus compelled 'to be a witness against himself.'[6]

***762** If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. in Miranda v. Arizona, 384 U.S. 436, at 460, 86 S.Ct. 1602, at 1620, 16 L.Ed.2d 694, at 715, the Court said of the interests protected by the privilege: 'All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' * * * to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.' The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the 'inviolability of the human personality.' Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused 'by its own independent labors.'

As the passage in Miranda implicitly recognizes, however, the privilege has never been given the full scope which the values it helps to protect suggest. History ***763** and a long line of authorities in lower courts have consistently limited its protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through 'the cruel, simple expedient of compelling it from his own mouth. * * * In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will. '' Ibid. The leading case in this Court is Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021. There the qustion was whether evidence was admissible that the accused, prior to trial and over his protest, put on a blouse that fitted him. It was contended that compelling the accused to submit to the demand that he model the blouse violated the privilege. Mr. Justice Holmes, speaking for the Court, rejected the argument ****1832** as 'based upon an extravagant extension of the 5th Amendment,' and went on to say: '(T)he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.

The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.' 218 U.S., at 252—253, 31 S.Ct., at 6.[7]

It is clear that the protection of the privilege reaches an accused's communications, whatever form they might ***764** take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.[8] The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198.

***765** In the present case, however, no such problem of application is presented. Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant ****1833** to the results of the test, which depend on chemical analysis and on that alone.[9] Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.

III.

THE RIGHT TO COUNSEL CLAIM.

This conclusion also answers petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on the advice of counsel, ***766** he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

IV.

THE SEARCH AND SEIZURE CLAIM.

In Breithaupt, as here, it was also contended that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments. The Court did not decide whether the extraction of blood in that case was unlawful, but rejected the claim on the basis of Wolf v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782. That case had held that the Constitution did not require, in state prosecutions for state crimes, the exclusion of evidence obtained in violation of the Fourth Amendment's provisions. We have since overruled Wolf in that respect, holding in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, that the exclusionary rule adopted for federal prosecutions in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, must also be applied in criminal prosecutions in state courts. The question is squarely presented therefore, whether the chemical analysis ***767** introduced in evidence in this case should have been excluded as the product of an unconstitutional search and seizure.

****1834** The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In Wolf we recognized '(t)he security of one's privacy against arbitrary intrusion by the police' as being 'at the core of the Fourth Amendment' and 'basic to a

free society.' 338 U.S., at 27, 69 S.Ct. at 1361. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in Mapp.

The values protected by the Fourth Amendment thus substantially overlap those of the Fifth Amendment helps to protect. History and precedent have required that we today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime. But if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment. That Amendment expressly provides that '(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.' (Emphasis added.) It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.

Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and ***768** effects'—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant,[10] as distinct from the procedures for search and the permissible scope of search,[11] are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol contest, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

In this case, as will often be true when charges of driving under the influence of alcohol are pressed, these questions arise in the context of an arrest made by an officer without a warrant. Here, there was plainly probable cause for the officer to arrest petitioner and charge him with driving an automobile while under the influence of intoxicating liquor.[12] The ****1835** police officer who arrived ***769** at the scene shortly after the accident smelled liquor on petitioner's breath, and testified that petitioner's eyes were 'bloodshot, watery, sort of a glassy appearance.' The officer saw petitioner again at the hospital, within two hours of the accident. There he noticed similar symptoms of drunkenness. He thereupon informed petitioner 'that he was under arrest and that he was entitled to the services of an attorney, and that he could remain silent, and that anything that he told me would be used against him in evidence.'

While early cases suggest that there is an unrestricted 'right on the part of the government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime,' Weeks v. United States, 232 U.S. 383, 392, 34 S.Ct. 341, 344,58 L.Ed.2d 652;People v. Chiagles, 237 N.Y. 19 o, 142 N.E. 583 (1923) (Cardozo, J.), the mere fact of a lawful arrest does not end our inquiry. The suggestion of these cases apparently rests on two factors—first, there may be more immediate danger of concealed weapons or of destruction of evidence under the direct control of the accused, United States v. Rabinowitz, 339 U.S. 56, 72—73, 70 S.Ct. 430, 437, 438, 94 L.Ed. 653 (Frankfurter, J., dissenting); second, once a search of the arrested person for weapons is permitted, it would be both impractical and unnecessary to enforcement of the Fourth Amendment's purpose to attempt to confine the search to those objects alone.People v. Chiagles, 237 N.Y., at 197—198, 142 N.E., at 584. Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in ***770** human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the

human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' Johnson v. United States, 333 U.S. 10, 13—14, 68 S.Ct. 367, 369, 92 L.Ed. 436; see also Aguilar v. State of Texas, 378 U.S. 108, 110—111, 84 S.Ct. 1509, 1511, 1512, 12 L.Ed.2d 723. The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,' ****1836** Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had ***771** to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. See Breithaupt v. Abram, 352 U.S., at 436, n. 3, 77 S.Ct. at 410, 1 L.Ed.2d 448. Such tests are a commonplace in these days of periodic physical examination[13] and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain. Petitioner is not one of the few who on grounds of fear, concern for health, or religious scruple might prefer some other means of testing, such as the 'Breathalyzer' test petitioner refused, see n. 9, supra. We need not decide whether such wishes would have to be respected.[14]

Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most ***772** rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Affirmed.

Mr. Justice HARLAN, whom Mr. Justice STEWART joins, concurring.

In joining the Court's opinion I desire to add the following comment. While agreeing with the Court that the taking of this blood test involved no testimonial compulsion, I would go further and hold that apart from this consideration the case in no way implicates the Fifth Amendment. Cf. my dissenting opinion and that of Mr. Justice White in Miranda v. Arizona, 384 U.S. 504, 526,86 S.Ct. 1643, 1655, 16 L.Ed.2d 740, 753.

Mr. Chief Justice WARREN, dissenting.

While there are other important constitutional issues in this case, I believe it ****1837** is sufficient for me to reiterate my dissenting opinion in Breithaupt v. Abram, 352 U.S. 432, 440, 77 S.Ct. 408, 412, as the basis on which to reverse this conviction.

***773** Mr. Justice BLACK with whom Mr. Justice DOUGLAS joins, dissenting.

I would reverse petitioner's conviction. I agree with the Court that the Fourteenth Amendment made applicable to the States the Fifth Amendment's provision that 'No person * * * shall be compelled in any criminal case to be a witness against himself * * *.' But I disagree with the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his

will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.

The Court admits that 'the State compelled (petitioner) to submit to an attempt to discover evidence (in his blood) that might be (and was) used to prosecute him for a criminal offense.' To reach the conclusion that compelling a person to give his blood to help the State convict him is not equivalent to compelling him to be a witness against himself strikes me as quite an extraordinary feat. The Court, however, overcomes what had seemed to me to be an insuperable obstacle to its conclusion by holding that
'* * * the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.' (Footnote omitted.)

I cannot agree that this distinction and reasoning of the Court justify denying petitioner his Bill of Rights' guarantee that he must not be compelled to be a witness against himself.

***774** In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a 'testimonial' and a 'communicative nature.' The sole purpose of this project which proved to be successful was to obtain 'testimony' from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly 'communicative' in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.

I think it unfortunate that the Court rests so heavily for its very restrictive reading of the Fifth Amendment's privilege against self-incrimination on the words 'testimonial' and 'communicative.' These words are not models of clarity and precision as the Court's rather labored explication shows. Nor can the Court, so far as I know, find precedent in the former opinions of this Court for using these particular words to limit the scope of the Fifth Amendment's protection. There is a scholarly precedent, however, in the late Professor Wigmore's learned treatise on evidence. He used 'testimonial' which, according to the latest edition of his treatise revised by McNaughton, means 'communicative' (8 Wigmore, Evidence s 2263 (McNaughton rev. 1961), p. 378), as a key word in his vigorous and extensive campaign designed to keep the privilege against self-incrimination 'within limits the strictest possible.' 8 Wigmore, Evidence s 2251 (3d ed. 1940), p. 318. Though my admiration for Professor Wigmore's scholarship is great, I regret to see the word he used to narrow the Fifth Amendment's protection play such a major part in any of this Court's opinions.

I am happy that the Court itself refuses to follow Professor Wigmore's implication ****1838** that the Fifth Amendment ***775** goes no further than to bar the use of forced self-incriminating statements coming from a 'person's own lips.' It concedes, as it must so long as Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more 'testimonial' value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly 'communicate' to a court and jury the fact of guilt.

The Court itself, at page 1832, expresses its own doubts, if not fears, of its own shadowy distinction between compelling 'physical evidence' like blood which it holds does not amount to compelled self-incrimination, and 'eliciting responses which are essentially testimonial.' And in explanation of its fears the Court goes on to warn that
'To compel a person to submit to testing (by lie detectors for example) in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard.' Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198 (35 L.Ed. 1110).'

A basic error in the Court's holding and opinion is its failure to give the Fifth Amendment's protection against ***776** compulsory self-incrimination the broad and liberal construction that Counselman and other opinions of this Court have declared it ought to have.

The liberal construction given the Bill of Rights' guarantee in Boyd v. United States, supra, which Professor Wigmore criticized severely, see 8 Wigmore, Evidence, s 2264 (3d ed. 1940), pp. 366—373, makes that one among the greatest constitutional decisions of this Court. In that case, 116 U.S. at 634—635, 6 S.Ct. at 534, all the members of the Court decided that civil suits for penalties and forfeitures incurred for commission of offenses against the law,

'* * * are within the reason of criminal proceedings for all the purposes of * * * that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; * * * within the meaning of the fifth amendment to the constitution * * *.'*

Obviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this, the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees:

'A close and literal construction (of constitutional provisions for the security of persons and property) deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional **1839 rights of the citizen, and against any stealthy encroachments *777 thereon.' Boyd v. United States, supra, at 635, 6 S.Ct. at 535.

The Court went on to say, at 637, 6 S.Ct. at 536, that to require 'an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself.' The Court today departs from the teachings of Boyd. Petitioner Schmerber has undoubtedly been compelled to give his blood 'to furnish evidence against himself,' yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.

The Court apparently, for a reason I cannot understand, finds some comfort for its narrow construction of the Fifth Amendment in this Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. I find nothing whatever in the majority opinion in that case which either directly or indirectly supports the holding in this case. In fact I think the interpretive constitutional philosophy used in Miranda, unlike that used in this case, gives the Fifth Amendment's prohibition against compelled self-incrimination a broad and liberal construction in line with the wholesome admonitions in the Boyd case. The closing sentence in the Fifth Amendment section of the Court's opinion in the present case is enough by itself, I think, to expose the unsoundness of what the Court here holds. That sentence reads:

'Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds.'

*778 How can it reasonably be doubted that the blood test evidence was not in all respects the actual equivalent of 'testimony' taken from petitioner when the result of the test was offered as testimony, was considered by the jury as testimony, and the jury's verdict of guilt rests in part on that testimony? The refined, subtle reasoning and balancing process used here to narrow the scope of the Bill of Rights' safeguard against self-incrimination provides a handy instrument for further narrowing of that constitutional protection, as well as others, in the future. Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding. For the foregoing reasons as well as those set out in concurring opinions of Black and Douglas, JJ., in Rochin v. People of California, 342 U.S. 165, 174, 177, 72 S.Ct. 205, 210, 212, 96 L.Ed. 183, and my concurring opinion in Mapp v. Ohio, 367 U.S. 643, 661, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081, and the dissenting opinions in Breithaupt v. Abram, 352 U.S. 432, 440, 442, 77 S.Ct. 408, 412, 413, 1 L.Ed.2d 448, I dissent from the Court's holding and opinion in this case.

Mr. Justice DOUGLAS, dissenting.

I adhere to the views of The Chief Justice in his dissent in Breithaupt v. Abram, 352 U.S. 432, 440, 77 S.Ct. 408, 412, 1 L.Ed.2d 448, and to the views I stated in my dissent in that case (id., 442, 77 S.Ct. 413) and add only a word.

We are dealing with the right of privacy which, since the Breithaupt case, we have held to be within the penumbra of some specific guarantees of the Bill of Rights. **1840 Griswold v. State of Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510. Thus, the Fifth Amendment marks 'a zone of privacy' which the Government may

not force a person to surrender. Id., 484, 85 S.Ct. 1681. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be ***779** secure 'in their persons.' Ibid. No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.

Mr. Justice FORTAS, dissenting.

I would reverse. In my view, petitioner's privilege against self-incrimination applies. I would add that, under the Due Process Clause, the State, in its role as prosecutor, has no right to extract blood from an accused or anyone else, over his protest. As prosecutor, the State has no right to commit any kind of violence upon the person, or to utilize the results of such a tort, and the extraction of blood, over protest, is an act of violence. Cf. Chief Justice Warren's dissenting opinion in Breithaupt v. Abram, 352 U.S. 432, 440, 77 S.Ct. 408, 412, 1 L.Ed.2d 448.

All Citations

384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908

Footnotes

1 California Vehicle Code s 23102(a) provides, in pertinent part, 'It is unlawful for any person who is under the influence of intoxicating liquor * * * to drive a vehicle upon any highway. * * *' The offense is a misdemeanor.

2 Petitioner and a companion had been drinking at a tavern and bowling alley. There was evidence showing that petitioner was driving from the bowling alley about midnight November 12, 1964, when the car skidded, crossed the road and struck a tree. Both petitioner and his companion were injured and taken to a hospital for treatment.

3 This was the judgment of the highest court of the State in this proceeding since certification to the California District Court of Appeal was denied. See Edwards v. People of State of California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119.

4 We 'cannot see that it should make any difference whether one states unequivocally that he objects or resorts to physical violence in protest or is in such condition that he is unable to protest.' Breithaupt v. Abram, 352 U.S., at 441, 77 S.Ct., at 413. (WARREN, C.J., dissenting). It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force. Compare the discussion at Part IV, infra.

5 A dissent suggests that the report of the blood test was 'testimonial' or 'communicative,' because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is 'testimonial' or 'communicative' if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or headshake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others.

6 Many state constitutions, including those of most of the original Colonies, phrase the privilege in terms of compelling a person to give 'evidence' against himself. But our decision cannot turn on the Fifth Amendment's use of the word 'witness.' '(A)s the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation * * *.' Counselman v. Hitchcock, 142 U.S. 547, 584—585, 12 S.Ct. 195, 206, 35 L.Ed. 1110. 8 Wigmore, Evidence s 2252 (McNaughton rev. 1961).

7 Compare Wigmore's view, 'that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to extract from the person's own lips an admission of guilt, which would thus take the place of other evidence.' 8 Wigmore, Evidence s 2263 (McNaughton rev. 1961). California adopted the Wigmore formulation in People v. Trujillo, 32 Cal.2d 105, 194 P.2d 681 (1948); with specific regard to blood tests, see People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8 (1953); People v. Duroncelay, 48 Cal.2d 766, 312 P.2d 690 (1957). Our holding today, however, is not to be understood as adopting the Wigmore formulation.

8 The cases are collected in 8 Wigmore, Evidence s 2265 (McNaughton rev. 1961). See also United States v. Chibbaro, 361 F.2d 365 (C.A.3d Cir. 1966); People v. Graves, 64 Cal.2d 208, 49 Cal.Rptr. 386, 388, 411 P.2d 114, 116 (1966); Weintraub, Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination, 10 Vand.L.Rev. 485 (1957).

9 This conclusion would not necessarily govern had the State tried to show that the accused had incriminated himself when told that he would have to be tested. Such incriminating evidence may be an unavoidable by-product of the compulsion to take the test, especially for an individual who fears the extraction or opposes it on religious grounds. If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to forgo the advantage of any testimonial products of administering the test—products which would fall within the privilege. Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the 'search,' and nothing we say today should be taken as establishing the permissibility of compulsion in that case. But no such situation is presented in this case. See text at n. 13 infra.

Petitioner has raised a similar issue in this case, in connection with a police request that he submit to a 'breathalyzer' test of air expelled from his lungs for alcohol content. He refused the request, and evidence of his refusal was admitted in evidence without objection. He argues that the introduction of this evidence and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106. We think general Fifth Amendment principles, rather than the particular holding of Griffin, would be applicable in these circumstances, see Miranda v. Arizona, 384 U.S. at p. 468, n. 37, 86 S.Ct. 1624. Since trial here was conducted after our decision in Malloy v. Hogan, supra, making those principles applicable to the States, we think petitioner's contention is foreclosed by his failure to object on this ground to the prosecutor's question and statements.

10 See, e.g., Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647;Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; contra, People v. Thayer, 63 Cal.2d 635, 47 Cal.Rptr. 780, 408 P.2d 108 (1965); State v. Bisaccia, 45 N.J. 504, 213 A.2d 185 (1965); Note, Evidentiary Searches: The Rule and the Reason, 54 Geo.L.J. 593 (1966).

11 See, e.g. Silverman v. United States, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734;Abel v. United States, 362 U.S. 217, 235,80 S.Ct. 68***o***, 695,4 L.Ed.2d 668;United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653.

12 California law authorizes a peace officer to arrest 'without a warrant * * * (w)henever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.' Cal. Penal Code s 836.3. Although petitioner was ultimately prosecuted for a misdemeanor he was subject to prosecution for the felony since a companion in his car was injured in the accident, which apparently was the result of traffic law violations. Cal.Vehicle Code s 23101. California's test of probable cause follows the federal standard. People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965).

13 'The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.' Breithaupt v. Abram, 352 U.S., at 436, 77 S.Ct. at 410.

14 See Karst, Legislative Facts in Constitutional Litigation, 1960 Sup.Ct.Rev. 75, 82—83.

* A majority of the Court applied the same constitutional interpretation to the search and seizure provisions of the Fourth Amendment over the dissent of Mr. Justice Miller, concurred in by Chief Justice Waite.

88 S.Ct. 967
Supreme Court of the United States

Thomas Earl SIMMONS et al., Petitioners,

v.

UNITED STATES.

No. 55.
|
Argued Jan. 15, 1968.
|
Decided March 18, 1968.

Synopsis

The defendants were convicted of armed robbery of federally insured savings and loan association. The United States District Court for the Northern District of Illinois, Eastern Division, rendered judgment and they appealed. The United States Court of Appeals for the Seventh Circuit, 371 F.2d 296, affirmed in part and reversed in part, and certiorari was granted. The Supreme Court, Mr. Justice Harlan, held that testimony given by defendant to meet standing requirements to raise objection that evidence is fruit of unlawful search and seizure should not be admissible against him at trial on question of guilt or innocence.

Affirmed in part and reversed and remanded in part.

Mr. Justice Black and Mr. Justice White dissented in part.

Attorneys and Law Firms

****969** ***379** Raymond J. Smith for petitioners.

Sol. Gen. Erwin N. Griswold, for respondent.

Opinion

Mr. Justice HARLAN delivered the opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

The evidence at trial showed that at about 1:45 p.m. ***380** on February 27, 1964, two men entered a Chicago savings and loan association. One of them pointed a gun at a teller and ordered her to put money into a sack which the gunman supplied. The men remained in the bank about five minutes. After they left, a bank employee rushed to the street and saw one of the men sitting on the passenger side of a departing white 1960 Thunderbird automobile with a large scrape on the right door. Within an hour police located in the vicinity a car matching this description. They discovered that it belonged to a Mrs. Rey, sister-in-law of petitioner Simmons. She told the police that she had loaned the car for the afternoon to her brother, William Andrews.

At about 5:15 p.m. the same day, two FBI agents came to the house of Mrs. Mahon, Andrews' mother, about half a block from the place where the car was then parked.[1] The agents had no warrant, and at trial it was disputed whether Mrs. Mahon gave them permission to search the house. They did search, and in the basement they found two suitcases, of which Mrs. Mahon disclaimed any knowledge. One suitcase contained, among other items, a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed.

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photographs ***381** of petitioner Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and ****970** that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the 'suppression' hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber. The District Court denied the petitioners' request under 18 U.S.C. s 3500

(the so-called Jencks Act) for production of the photographs which had been shown to the witnesses before trial.

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery. 371 F.2d 296.

We granted certiorari as to Simmons and Garrett, 388 U.S. 906, 87 S.Ct. 2108, 18 L.Ed.2d 1345, to consider the following claims. First, Simmons asserts that his pretrial identification (by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power ***382** over the lower federal courts. Second, both petitioners contend that the District Court erred in refusing defense requests for production under 18 U.S.C. s 3500 of the pictures of the petitioners which were shown to eyewitnesses prior to trial. Third, Garrett urges that his constitutional rights were violated when testimony given by him in support of his 'suppression' motion was admitted against him at trial. For reasons which follow, we affirm the judgment of the Court of Appeals as to Simmons, but reverse as to Garrett.

I.

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's 'lineup' decisions—United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 and Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178—in which this Court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissibility, of identification testimony at trial. The rationale of those cases was that an ***383** accused is entitled to counsel at any 'critical stage of the prosecution,' and that a post-indictment lineup is such a 'critical stage.' See 388 U.S., at 236—237, 87 S.Ct., at 1937—1938. Simmons, however, does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. See ****971** Stovall v. Denno, 388 U.S. 293, at 302, 87 S.Ct. 1967, at 1972, 18 L.Ed.2d 1199; Palmer v. Peyton, 4 Cir., 359 F.2d 199. Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.[2] The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.[3] Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually ***384** seen, reducing the trustworthiness of subsequent lineup or courtroom identification.[4]

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the

method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This standard accords with our resolution of a similar issue in Stovall v. Denno, 388 U.S. 293, 301—302, 87 S.Ct. 1967, 1972—1973, and with decisions of other courts on the question of identification by photograph.[5]

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to ***385** Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities. The justification for this method of procedure was hardly less compelling than that which we found to justify the 'one-man lineup' in Stovall v. Denno, supra.

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took ****972** place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers. None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some ***386** respects fallen short of the ideal.[6] We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

II.

It is next contended, by both petitioners, that in any event the District Court erred in refusing a defense request that the photographs shown to the witnesses prior to trial be turned over to the defense for purposes of cross-examination. This claim to production is based on 18 U.S.C. s 3500, the so-called Jencks Act. That Act, passed in response to this Court's decision in Jancks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103, provides that after a witness has testified for the Government in a federal criminal prosecution the Government must, on request of the defense, produce any 'statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.' For the Act's purposes, as they relate to this case, a 'statement' is defined as 'a written statement made by said witness and signed or otherwise adopted or approved by him * * *.'

***387** Written statements of this kind were taken from all five eyewitnesses by the FBI on the day of the robbery. Apparently none were taken thereafter. When these statements were produced by the Government at trial pursuant to s 3500, the defense also claimed the right to look at the photographs 'under 3500.' The District Judge denied these requests.

The petitioners' theory seems to be that the photographs were incorporated ****973** in the written statements of the witnesses, and that they therefore had to be produced under s 3500. The legislative history of the Jencks Act does confirm that photographs must be produced if they constitute a part of a written statement.[7] However, the record in this case does not bear out the petitioners' claim that the pictures involved here were part of the statements which were approved by the witnesses and, therefore, producible under s 3500. It appears that all such statements were made on the day of the robbery. At that time, the FBI and police had no pictures of the

petitioners. The first pictures were not acquired and shown to the witnesses until the morning of the following day. Hence, they could not possibly have been a part of the statements made and approved by the witnesses the day of the robbery.

The petitioners seem also to suggest that, quite apart from s 3500, the District Court's refusal of their request for the photographs amounted to an abuse of discretion. The photographs were not referred to by the Government in its case-in-chief. They were first asked for by the defense after the direct examination of the first eyewitness, ***388** on the second day of the trial. When the defense requested the pictures, counsel for the Government noted that there were a 'multitude' of pictures and stated that it might be difficult to identify those which were shown to particular witnesses. However, he indicated that the Government was willing to furnish all of the pictures, if they could be found. The District Court, referring to the fact that production of the photographs was not required under s 3500, stated that it would not stop the trial in order to have the pictures made available.

Although the pictures might have been of some assistance to the defense, and although it doubtless would have been preferable for the Government to have labeled the pictures shown to each witness and kept them available for trial,[8] we hold that in the circumstances the refusal of the District Court to order their production did not amount to an abuse of discretion, at least as to petitioner Simmons.[9] The defense surely knew that photographs had played a role in the identification process. Yet there was no attempt to have the pictures produced prior to trial pursuant to Fed.Rule Crim.Proc. 16. When production of the pictures was sought at trial, the defense did not explain why they were ***389** needed, but simply argued that production was required under s 3500. Moreover, the strength of the eyewitness identifications of Simmons renders it highly unlikely that nonproduction of the photographs caused him any prejudice.

III.

Finally, it is contended that it was reversible error to allow the Government to use against Garrett on the ****974** issue of guilt the testimony given by him upon his unsuccessful motion to suppress as evidence the suitcase seized from Mrs. Mahon's basement and its contents. That testimony established that Garrett was the owner of the suitcase.[10]

In order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure. Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652. More recently, this Court has held that 'the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments * * *.' Mapp v. Ohio, 367 U.S. 643, 657, 81 S.Ct. 1684, 1693, 6 L.Ed.2d 1081.

However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, e.g., Jones v. United States, 362 U.S. 257, 260—261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697. At one time a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of ***390** the seized property or that he had a possessory interest in the searched premises.[11] In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in Jones v. United States, supra. First, we held that when, as in Jones, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. Throughout this case, petitioner Garrett has justifiably, and without challenge from the Government, proceeded on the assumption that the standing requirements must be satisfied.[12] On that premise, he contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence. We agree.

Under the standing rules set out in Jones, there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing. This case serves as an example. ***391** Garrett evidently was not in Mrs. Mahon's house at the time his suitcase was seized from her basement. The only, or at least the most natural, way in which he could found ****975** standing to object to the admission of the suitcase was to testify that he was its owner.[13] Thus, his testimony is to

be regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial. Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.[14]

The dilemma faced by defendants like Garrett is most extreme in prosecutions for possessory crimes, for then the testimony required for standing itself proves an element of the offense. We eliminated that Hobson's choice in Jones v. United States, supra, by relaxing the standing requirements. This Court has never considered squarely the question whether defendants charged with nonpossessory crimes, like Garrett, are entitled to be relieved ***392** of their dilemma entirely.[15] The lower courts which have considered the matter, both before and after Jones, have with two exceptions agreed with the holdings of the courts below that the defendant's testimony may be admitted when, as here, the motion to suppress has failed.[16] The reasoning of some of these courts would seem to suggest that the testimony would be admissible even if the motion to suppress had succeeded,[17] but the only court which has actually decided that question held that when the motion to suppress succeeds the testimony given in support if it is excludable as a 'fruit' of the unlawful search.[18] The rationale for admitting the testimony when the motion fails has been that the testimony is voluntarily given and relevant, and that it is therefore entitled to admission on the same basis as any other prior testimony or admission of a party.[19]

It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment ***393** claim. The likelihood of inhibition is greatest when ****976** the testimony is known to be admissible regardless of the outcome of the motion to suppress. But even in jurisdictions where the admissibility of the testimony depends upon the outcome of the motion, there will be a deterrent effect in those marginal cases in which it cannot be estimated with confidence whether the motion will succeed. Since search-and-seizure claims depend heavily upon their individual facts,[20] and since the law of search and seizure is in a state of flux,[21] the incidence of such marginal cases cannot be said to be negligible. In such circumstances, a defendant with a substantial claim for the exclusion of evidence may conclude that the admission of the evidence, together with the Government's proof linking it to him, is preferable to risking the admission of his own testimony connecting himself with the seized evidence.

The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary.[22] As an abstract matter, this may well be true. A defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he ***394** refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.[23] However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit.[24] When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

For the foregoing reasons, we affirm the judgment of the Court of Appeals so far as it relates to petitioner Simmons. We reverse the judgment with respect to petitioner Garrett, and as to him remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Affirmed in part and reversed and remanded in part.

****977** Mr. Justice MARSHALL took no part in the consideration or decision of this case.

***395** Mr. Justice BLACK, concurring in part and dissenting in part.

I concur in affirmance of the conviction of Simmons but dissent from reversal of Garrett's conviction. I shall first discuss Simmons' case.

1. Simmons' chief claim is that his 'pretrial identification (was) so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of law.' The Court rejects this contention. I agree with the Court but for quite different reasons. The Court's opinion rests on a lengthy discussion of inferences that the jury could have drawn from the evidence of identifying witnesses. A mere summary reading of the evidence as outlined by this Court shows that its discussion is concerned with the weight of the testimony given by the identifying witnesses. The weight of the evidence, however, is not a question for the Court but for the jury, and does not raise a due process issue. The due process question raised by Simmons is, and should be held to be, frivolous. The identifying witnesses were all present in the bank when it was robbed and all saw the robbers. The due process contention revolves around the circumstances under which these witnesses identified pictures of the robbers shown to them, and these circumstances are relevant only to the weight the identification was entitled to be given. The Court, however, considers Simmons' contention on the premise that a denial of due process could be found in the 'totality of circumstances' of the picture identification. I do not believe the Due Process Clause or any other constitutional provision vests this Court with any such wideranging, uncontrollable power. A trial according to due process of law is a trial according to the 'law of the land'—the law as enacted by the Constitution or the Legislative Branch of Government, and not 'laws' formulated by the courts according to ***396** the 'totality of the circumstances.' Simmons' due process claim here should be denied because it is frivolous.[*] For these reasons I vote to affirm Simmons' conviction.

2. I agree with the Court, in part for reasons it assigns, that the District Court did not commit error in declining to permit the photographs used to be turned over to the defense for purposes of cross-examination.

3. The Court makes new law in reversing Garrett's conviction on the ground that it was error to allow the Government to use against him testimony he had given upon his unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment. The testimony used was Garrett's statement in the suppression hearing that he was the owner of a suitcase which contained money wrappers taken from the bank that was robbed. The Court is certainly guilty of no overstatement in saying that this 'was undoubtedly a strong piece of evidence against (Garrett).' Ante, at 975. In fact, one might go further and say that this testimony, along with the statements of the eyewitnesses against him, showed beyond all question that Garrett was one of the bank robbers. The question then is whether the Government is barred from offering a truthful statement made by a defendant at a suppression hearing in order to prevent the defendant from winning an acquittal on the false premise that he is not the owner of the property he has already sworn that he owns. My answer to this question is ****978** 'No.' The Court's answer is 'Yes' on the premise that 'a defendant who knows that his testimony may be admissible against him at trial will sometimes ***397** be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim.' Ante, at 975.

For the Court, though not for me, the question seems to be whether the disadvantages associated with deterring a defendant from testifying on a motion to suppress are significant enough to offset the advantages of permitting the Government to use such testimony when relevant and probative to help convict the defendant of a crime. The Court itself concedes, however, that the deterrent effect on which it relies comes into play, at most, only in 'marginal cases' in which the defendant cannot estimate whether the motion to suppress will succeed. Ante, at 975. The value of permitting the Government to use such testimony is, of course, so obvious that it is usually left unstated, but it should not for that reason be ignored. The standard of proof necessary to convict in a criminal case is high, and quite properly so, but for this reason highly probative evidence such as that involved here should not lightly be held inadmissible. For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts

to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence.

This leaves for me only the possible contention that Garrett's testimony was inadmissible under the Fifth Amendment because it was compelled. Of course, I could never accept the Court's statement that 'testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit.' Ante, at 976. No matter what Professor Wigmore may have thought about the subject, it has always been clear to me that any threat of harm or promise of benefit is sufficient to render a defendant's statement involuntary. See, ***398** Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367, 83 S.Ct. 448, 463, 9 L.Ed.2d 357 (1963) (dissenting opinion). The reason why the Fifth Amendment poses no bar to acceptance of Garrett's testimony is not, therefore, that a promise of benefit is not generally fatal. Rather, the answer is that the privilege against self-incrimination has always been considered a privilege that can be waived, and the validity of the waiver is, of course, not undermined by the inevitable fact that by testifying, a defendant can obtain the 'benefit' of a chance to help his own case by the testimony he gives. When Garrett took the stand at the suppression hearing, he validly surrendered his privilege with respect to the statements he actually made at that time, and since these statements were therefore not 'compelled,' they could be used against him for any subsequent purpose.

The consequence of the Court's holding, it seems to me, is that defendants are encouraged to come into court, either in person or through other witnesses, and swear falsely that they do not own property, knowing at the very moment they do so that they have already sworn precisely the opposite in a prior court proceeding. This is but to permit lawless people to play ducks and drakes with the basic principles of the administration of criminal law.

There is certainly no language in the Fourth Amendment which gives support to any such device to hobble law enforcement in this country. While our Constitution does provide procedural safeguards to protect defendants from arbitrary convictions, that governmental charter holds out no promises to stultify justice by erecting barriers to the admissibility of relevant evidence voluntarily given in a court of justice. Under the first principles of ethics and morality a defendant who secures a court order by telling the truth should not be allowed to seek a court advantage later based on a premise ***399** directly opposite to his prior ****979** solemn judicial oath. This Court should not lend the prestige of its high name to such a justice-defeating stratagem. I would affirm Garrett's conviction.

Mr. Justice WHITE, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion but dissent from the reversal of Garrett's conviction substantially for the reasons given by Mr. Justice BLACK in his separate opinion.

All Citations

390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247

Footnotes

1 Mrs. Mahon also testified that at about 3:30 p.m. the same day six men with guns forced their way into and ransacked her house. However, these men were never identified, and they apparently took nothing.

2 See P. Wall, Eye-Witness Identification in Criminal Cases 74—77 (1965).

3 See id., at 82—83.

4 See id., at 68—70.

5 See e.g., People v. Evans, 39 Cal.2d 242, 246 P.2d 636.

6 The reliability of the identification procedure could have been increased by allowing only one or two of the five eyewitnesses to view the pictures of Simmons. If thus identified, Simmons could later have been displayed to the other eyewitnesses in a lineup, thus permitting the photographic identification to be supplemented by a corporeal identification, which is normally more accurate. See P. Wall, Eye-Witness Identification in Criminal Cases 83 (1965); Williams, Identification Parades, (1955) Crim.L.Rev. 525, 531. Also, it probably would have been preferable for the witnesses to have been shown more than six snapshots, for those snapshots to have pictured a greater number of

individuals, and for there to have been proportionally fewer pictures of Simmons. See Wall, supra, at 74—82; Williams, supra, at 530.

7 In the discussion of the bill on the floor of the Senate, Senator O'Mahoney, sponsor of the bill in the Senate, stated that photographs per se were not required to be produced under the bill, but that '(i)f the pictures have anything to do with the statement of the witness * * * of course that would be part of it * * *.' 103 Cong.Rec. 16489.

8 See P. Wall, Eye-Witness Identification in Criminal Cases 84 (1965); Williams, Identification Parades, (1955) Crim.L.Rev. 525, 530.

9 Garrett was also initially identified from photographs, but at a later date than Simmons. He was identified by fewer witnesses than was Simmons, and even those witnesses had less opportunity to see him during the robbery than they did Simmons. The record is opaque as to the number and type of photographs of Garrett which were shown to these witnesses, and as to the circumstances of the showings. However, it is unnecessary to decide whether Garrett was prejudiced by the District Court's failure to order production of the pictures at trial, since we are reversing Garrett's conviction on other grounds.

10 Although petitioner Simmons objected at trial to the admission of Garrett's testimony, the claim was not pressed on his behalf here. Garrett did not mention Simmons in his testimony, and the District Court instructed the jury to consider the testimony only with reference to Garrett.

11 See, e.g., Jones v. United States, 362 U.S. 257, at 262, 80 S.Ct. 725, at 731; Edwards, Standing to Suppress Unreasonably Seized Evidence, 47 Nw.U.L.Rev. 471 (1952).

12 It has been suggested that the adoption of a 'police-deterrent' rationale for the exclusionary rule, see Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601, logically dictates that a defendant should be able to object to the admission against him of any unconstitutionally seized evidence. See Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U.Chi.L.Rev. 342 (1967); Note, Standing to Object to an Unlawful Search and Seizure, 1965 Wash.U.L.Q. 488. However, that argument is not advanced in this case, and we do not consider it.

13 The record shows that Mrs. Mahon, the owner of the premises from which the suitcase was taken, disclaimed all knowledge of its presence there and of its ownership.

14 The Government concedes that there were no identifying marks on the outside of the suitcase. See Brief for the United States at 33.

15 In Jones, the only reference to the subject was a statement that '(The defendant) has been faced * * * with the chance that the allegations made on the motion to suppress may be used against him at the trial, although that they may is by no means an inevitable holding * * *.' 362 U.S., at 262, 80 S.Ct., at 731.

16 See Heller v. United States, 7 Cir., 57 F.2d 627; Kaiser v. United States, 8 Cir., 60 F.2d 410; Fowler v. United States, 10 Cir., 239 F.2d 93; Monroe v. United States, 5 Cir., 320 F.2d 277; United States v. Taylor, 4 Cir., 326 F.2d 277; United States v. Airdo, 7 Cir., 380 F.2d 103; United States v. Lindsly, D.C., 7 F.2d 247, rev'd on other grounds, 12 F.2d 771. Contra, see Bailey v. United States, 128 U.S.App.D.C. 354, 389 F.2d 305; United States v. Lewis, D.C., 270 F.Supp. 807, 810, n. 1 (dictum).

17 See, e.g., Heller v. United States, 7 Cir., 57 F.2d 627; Monroe v. United States, 5 Cir., 320 F.2d 277.

18 See Safarik v. United States, 8 Cir., 62 F.2d 892, rehearing denied, 63 F.2d 369. Accord, Fowler v. United States, 10 Cir., 239 F.2d 93 (dictum); cf. Fabri v. United States, 9 Cir., 24 F.2d 185.

19 See cases cited in n. 16, supra.

20 See, e.g., United States v. Rabinowitz, 339 U.S. 56, 63, 70 S.Ct. 430, 434, 94 L.Ed. 653.

21 E.g., compare Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 with Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647; compare Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930, with Frank v. State of Maryland, 359 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877.

22 See, e.g., Heller v. United States, 7 Cir., 57 F.2d 627.

23 For example, testimony given for his own benefit by a plaintiff in a civil suit is admissible against him in a subsequent criminal prosecution. See 4 Wigmore, Evidence s 1066 (3d ed. 1940); 8 id., s 2276 (McNaughton rev. 1961).

24 Ibid.

* Although Simmons' 'question presented' raise no such contention, the Court declines to use its 'supervisory power' to hold Simmons' rights were violated by the identification methods. One must look to the Constitution in vain, I think, to find a 'supervisory power' in this Court to reverse cases like this on such a ground.

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984 F.3d 884
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

David G. BRUCE II, aka David G. Bruce, Defendant-Appellant.

No. 19-10289
|
Argued and Submitted August 14, 2020 San Francisco, California
|
Filed January 12, 2021

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of California, Dale A. Drozd, J., of conspiracy, attempt to possess with intent to distribute heroin or marijuana, and public official accepting bribe from his involvement in drug smuggling scheme at penitentiary where he worked as correctional officer. Defendant appealed.

Holdings: The Court of Appeals, Christen, Circuit Judge, held that:

use of photograph of defendant from social media during identification procedure was not so suggestive that it rendered witness's identification unreliable;

evidence that another corrections officer was smuggling drugs at corrections facility was exculpatory;

government was not relieved of its obligation to disclose that another corrections officer was under investigation for introducing contraband into another federal prison in very similar smuggling operation by merely disclosing his name in documents government did produce; and

government's failure to disclose exculpatory evidence did not undermine confidence in defendant's trial.

Affirmed.

Attorneys and Law Firms

***887** Amanda K. Moran (argued) and Janay D. Kinder, Moran Law Firm, Fresno, California, for Defendant-Appellant.

Vincenza Rabenn (argued), Assistant United States Attorney; Camil A. Skipper, Appellate Chief; McGregor W. Scott, United States Attorney; United States Attorney's Office, Sacramento, California; for Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of California, Dale A. Drozd, District Judge, Presiding, D.C. No. 1:17-cr-00077-DAD-BAM-1

Before: Michael Daly Hawkins and Morgan Christen, Circuit Judges, and James E. Gritzner,[*] District Judge.

OPINION

CHRISTEN, Circuit Judge:

David Bruce appeals his convictions for conspiracy, 18 U.S.C. § 371, Attempt to Possess with Intent to Distribute Heroin or Marijuana, 21 U.S.C. §§ 846, 841(a)(1), and Bribery: Public Official Accepting a Bribe, 18 U.S.C. § 201(b)(2)(C). The ***888** charges arose from Bruce's involvement in a drug smuggling scheme at the United States Penitentiary at Atwater, California, where Bruce worked as a correctional officer. After a jury trial, Bruce was convicted and sentenced to 78 months in prison.

Bruce raises two issues on appeal. First, he argues the district court erred by admitting testimony from another participant in the smuggling scheme who identified Bruce from a Facebook photo. We conclude the district court did not abuse its discretion by admitting the government's identification evidence. Second, Bruce argues he is entitled to a new trial because the government violated the discovery obligations imposed by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In particular, Bruce argues the government violated his right to due process because it failed to disclose evidence of another prison guard's alleged malfeasance. We agree with Bruce that at least some of the withheld evidence was exculpatory, but conclude it was not material within the meaning of *Brady*. The district court did not err by denying Bruce's motion for a new trial.

I.

On December 12, 2015, Thomas and Tracy Jones were on their way to visit an inmate at the United States Penitentiary in Atwater, California (Atwater), when guards conducting random car searches stopped them at a checkpoint. As the officers began their search, Jones admitted there were drugs in the car he was driving. The officers found four vacuum-packed bags of marijuana, a package of heroin, and three marijuana cigarettes.

Jones agreed to cooperate after investigators suggested that if he did not do so, he and his wife could face a lengthy incarceration, and he spoke to the investigators at length. Jones told the investigators that he and his wife had developed an online relationship with an inmate named Devonne Randolph over the course of the preceding year, and that they began visiting Randolph at Atwater. After Jones and his wife agreed to receive packages and cash for Randolph, packages containing money and "little medicated strips" began to arrive at their home. Jones also reported receiving transfers of cash from people associated with other Atwater inmates, and he told the officers that Randolph gave him a telephone number to send text messages to someone he referred to as "Officer Johnson" when packages arrived. According to Jones, Randolph said that Officer Johnson would deliver the packages to Randolph in prison. Jones admitted making a delivery to Officer Johnson in September 2015, and another in November. Both deliveries took place in a parking lot near Atwater. Jones recounted entering Officer Johnson's black Jeep Cherokee, handing him the packages, and leaving.

When asked to describe Officer Johnson, Jones said Johnson was "Hispanic looking" with dark curly hair. Jones also described Officer Johnson wearing a Pittsburgh Steelers hat and having a raspy voice, a heavyset build, and dark skin. One of the officers recalled seeing another correctional officer sporting a Steelers hat at an off-duty event. He showed Jones a Facebook photo from the event that included David Bruce and one other person. Bruce was the only one in the photo wearing a Steelers hat. Without hesitation, Jones identified Bruce as Officer Johnson.

In the days following the checkpoint interview, Jones assisted Atwater agents in setting up an additional meeting. An agent went to the parking lot as Jones had done before and sent a text message announcing his arrival. Within a few minutes, Bruce appeared driving one of two cars he owned. Though there was "[p]lenty of ***889** parking available," Bruce circled the parking lot twice and slowed down each time he passed Jones's car. The agents stopped Bruce, who denied being there for a drug deal but surrendered his telephone for a forensic examination. Approximately fifteen months later, in March 2017, Bruce was arrested and indicted for conspiracy, attempted possession with intent to distribute heroin or marijuana, and accepting a bribe as a public officer.

As Bruce's case proceeded toward trial, the government filed an ex parte motion for in camera review. The motion sought permission to not disclose certain information about two Atwater officers, including Officer Paul Hayes. The motion informed the district court that Hayes was present during the initial search of Jones's vehicle, but explained the government did not intend to call him as a trial witness. The motion disclosed to the court that Hayes's personnel file contained incriminating information, including more than seventy inmate complaints about him, and that he was under investigation for smuggling drugs into another prison. The court granted the government's motion and the information concerning Hayes was not produced to defense counsel. Also pretrial, the court denied Bruce's motion in limine to exclude all testimony concerning Jones's identification of Bruce.

The government's trial witnesses included Jones, who told the jury he was testifying in the hope that he would not be charged, and Robert Rush, an Atwater inmate who described himself as Bruce's friend. Rush testified that he helped Bruce orchestrate the smuggling scheme, that Bruce smuggled contraband into the prison, and that Rush sold it to other inmates and split the proceeds with Bruce. Rush also testified that Atwater guards pressured him to testify against Bruce.

The government's other witnesses included a Western Union representative who linked money transfers from Rush's friends and family to Bruce, and established that Bruce collected at least some of the money transfers using his California driver's license. A T-Mobile representative testified that someone purchased a prepaid cell phone within the same time frame as the investigation into the smuggling ring and within the same geographic market as Atwater. The witness explained that this type of phone did not require verification of the purchaser's full name, Social Security number, or address. Federal agents linked calls and texts from the cell phone to associates of various inmates and to Jones. Officers from Atwater corroborated Jones's account of the events on the day he and his wife were stopped at the

checkpoint, and described the investigation that followed the checkpoint stop.

The defense trial theory focused on demonstrating reasonable doubt about Bruce's participation in the narcotics smuggling ring. Bruce chose to testify, and although he conceded he was financially involved with inmates, he claimed these financial ties were limited to sports betting. Bruce testified that he drove a black Jeep Cherokee—the same kind of car Jones described Officer Johnson driving—and admitted that he knowingly violated prison policy by having a financial relationship with Rush. Bruce also admitted that he passed messages to inmates from outside the prison, and that he received money from Rush's girlfriend. Bruce testified that he viewed this payment as a "kind gesture" from Rush for his assistance with Rush's sports gambling. Bruce denied any other wrongdoing. The jury convicted Bruce on all counts.

Shortly after Bruce's verdict, the government indicted Hayes for taking part in a drug smuggling scheme at Victorville, a ***890** different federal prison in California. Hayes had transferred to work at Victorville prison after participating in the investigation at Atwater. The indictment charged Hayes with similar crimes and revealed that the investigation into Hayes's actions at Victorville began in July of 2018, approximately sixteen months after Bruce was indicted and seven months before Bruce's trial started. Bruce's defense team immediately investigated the charges against Hayes by conducting follow-up interviews at Atwater. This time, inmate Rush provided significantly more detail about the guards' efforts to get him to cooperate with their investigation and their efforts to persuade him to testify against Bruce.

Rush told the defense team that Hayes was part of a group of officers who threatened to keep Rush in segregated housing unless he testified at Bruce's trial. According to Rush, the same group threatened to arrest Rush's family and friends. Devonne Randolph, the inmate Jones and his wife intended to visit on the day they were stopped at the checkpoint, did not testify at Bruce's trial but Randolph told the defense team in a post-trial interview that rumors among inmates and staff suggested it was "common knowledge" that Hayes also smuggled drugs into Atwater while he was employed there. Randolph described correctional officers at Atwater using much more extreme measures to persuade him to give information about "whatever cops was allegedly breaking the law"—including threatening to physically assault him if he did not cooperate with the investigation. But Randolph told the defense team that he had no personal interactions with anyone called Officer Johnson, and that he did not know David Bruce.

Bruce moved for a new trial based on *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), arguing the government violated its obligation to produce exculpatory evidence. Bruce argued the government purposely failed to disclose that Hayes was a target in the Victorville investigation, and that many inmates had lodged complaints against Hayes while he worked at Atwater. The government urged the court to deny the motion. It argued it had no obligation to produce the evidence concerning Hayes because Federal Rule of Evidence 608 would have prevented Bruce from using it for impeachment purposes. The government also argued the evidence of Hayes' misconduct did not negate the plethora of evidence against Bruce, and that the government had no reason to know the extent of Hayes's involvement in the Atwater investigation because the investigation reports contained little mention of Hayes. The district court agreed with the government. It ruled the previously undisclosed information did not undermine the court's confidence in Bruce's verdict, and denied the motion for a new trial. Bruce timely appealed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the district court's orders admitting the identification evidence and denying Bruce's motion for new trial.

II.

We review de novo "[t]he constitutionality of pretrial identification procedures." *United States v. Carr*, 761 F.3d 1068, 1073 (9th Cir. 2014). We likewise review de novo the denial of a motion for a new trial arising from the government's duty to produce exculpatory evidence pursuant to *Brady*.[1] *United States v. Pelisamen*, 641 F.3d 399, 408 (9th Cir. 2011).

***891** III.

We first address Bruce's argument that the district court erred by allowing the government to admit evidence that Jones identified Bruce. In the district court, Bruce argued Jones's identification was unreliable because Jones identified Bruce under circumstances that were impermissibly suggestive. Specifically, after Jones described Officer Johnson wearing a Steelers' hat, he was shown a Facebook photo in which

Bruce was the only one wearing a Steelers' hat, and he selected Bruce from the photo.[2] The district court was not convinced, and it denied the motion to exclude Jones's identification of Bruce. The court reasoned the circumstances in Bruce's case were unlike those in which witnesses testify after one brief exposure to a suspect during the commission of a crime or while witnessing a startling event. Rather than resting on a single, quick view, Jones was in close proximity to "Officer Johnson" on at least two prior occasions when the two met to pass contraband. The court determined Jones was capable of providing reliable testimony about whether Bruce was the person he met without being unduly influenced by the Facebook photo.

To review the constitutionality of a pretrial identification procedure, we consider whether the "procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *see also* *Neil v. Biggers*, 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process ...."). Three factors guide our review: (1) whether "the pretrial identification procedure was impermissibly suggestive"; (2) whether "it was sufficiently reliable such that it does not implicate the defendant's due process rights"; and (3) "even if the pretrial identification procedure was suggestive and the identification was unreliable, this court [ ] examine[s] the district court's failure to exclude the identification for harmless error." *Carr*, 761 F.3d at 1074–75 (citing *Ocampo v. Vail*, 649 F.3d 1098, 1114 (9th Cir. 2011)).

An identification procedure is suggestive when it focuses upon a single individual thereby increasing the likelihood of misidentification. *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998). We examine the totality of the circumstances to determine whether an identification procedure was unduly suggestive. *United States v. Bagley*, 772 F.2d 482, 492 (9th Cir. 1985); *Neil*, 409 U.S. at 196, 93 S.Ct. 375. Among other factors, we have considered the witness's opportunity to view the person being identified, the witness's degree of attention, the accuracy of the witness's prior description, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the prior observation of the suspect and the confrontation. *Neil*, 409 U.S. at 199–200, 93 S.Ct. 375. "Any weaknesses in eyewitness identification testimony can ordinarily be revealed by counsel's careful cross-examination of the eyewitnesses." *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996).

Bruce argues that the use of the single Facebook photo violates longstanding precedent condemning identification techniques ***892** that focus attention on only one person. He argues such techniques are inherently suggestive and that the use of the Facebook photo was especially suggestive in this case because, according to Bruce, he and Hayes look alike: both have Hawaiian and Caucasian ancestry and "nearly identical body styles." Bruce points out that Jones's trial testimony was inconsistent about whether he told the Atwater officers that Officer Johnson always wore a hat, and he argues that Jones must have guessed about Johnson's height because Johnson was sitting in his car both times Jones met with him.

Bruce is correct that Jones was uncertain in his trial testimony about whether he told the officers who stopped him that Officer Johnson always wore a hat. Jones was also unsure about whether he had said the hat was a Steelers hat. And Jones testified that Officer Johnson was about "five-four, five-five," only to later admit that he could not be sure of this detail because he had never seen Officer Johnson standing.[3] Bruce contends these inconsistencies in Jones's trial testimony show he was never sure of his identification and that the evidence of Jones's identification should have been excluded for this reason. We disagree.

We are persuaded the district court reasonably concluded the use of the Facebook photo was not so suggestive that it rendered Jones's identification unreliable. *See Neil*, 409 U.S. at 199–200, 93 S.Ct. 375. Unlike witnesses who are startled by a crime in progress, Jones ventured out to meet with "Officer Johnson" on two occasions and voluntarily got into his car both times. The two men were in close proximity and the second meeting took place just 15 days before Jones was stopped and questioned at the checkpoint. The Atwater officers testified that Jones identified Bruce from the photo without hesitation, and Jones testified that he was certain of the identification at the time he made it in 2015. Jones explained to the jury that before he was shown the Facebook photo, he accurately described details concerning Officer Johnson's beard, hair color, body type, and clothing. Jones also recalled that Officer Johnson drove a black Jeep Cherokee.

More than three years passed between the day Jones identified Bruce from the Facebook photo and the day Jones testified at Bruce's trial. The jury was able to consider whether the passage of time may have accounted for the discrepancies between the identification Jones made in 2015 and the details

he was able to recall at trial. The jury was also able to consider defense counsel's cross-examination of Jones and it heard the testimony of other witnesses who had been present during the interview following the checkpoint stop. *See* *United States v. Higginbotham*, 539 F.2d 17, 23 (9th Cir. 1976) (finding no prejudice resulted from admission of identification evidence because jury heard cross-examination of identifying witness). Certainly, the jury had reason to question Jones's credibility because it knew investigators suggested to Jones that he and his wife could avoid charges if Jones cooperated, and the jury knew Jones was eager to cooperate. Bruce contends that Jones's description of Johnson matched Hayes as well as Bruce, but he did little to develop or support this argument in the district court and the record does not allow us to meaningfully assess this comparison on appeal. Even if the Facebook photo was suggestive, our consideration of the totality of the circumstances persuades us that the district court did not err by admitting this identification evidence.

***893** IV.

Bruce next argues the district court erred by denying his motion for a new trial because the government violated *Brady* by failing to produce evidence of Hayes's misconduct.[4] The government's pretrial motion sought an order permitting it to not disclose: (1) over seventy inmate complaints about Hayes, including some that alleged physical abuse; (2) that Hayes had been charged with domestic violence and was arrested for violating a protective order; (3) that two other investigations against Hayes were pending for physical abuse of inmates and for threatening inmates; and (4) that as of July 2018, Hayes was being investigated for smuggling contraband drugs into an unspecified prison, and had been observed meeting an inmate's girlfriend in a Home Depot parking lot and accepting a small package from her. The motion disclosed that an inmate instructed his girlfriend to meet an orange SUV with "Vegas plates" in a parking lot and that the description of the vehicle matched one that Hayes owned. The motion acknowledged that Hayes had been present at the Atwater checkpoint in 2015 and helped search Jones's car, but it argued the information about Hayes's alleged malfeasance need not be disclosed because other witnesses could testify about the contraband found in Jones's car.[5] Under a heading titled "Expected Defense Arguments," the government's motion only stated that if the evidence regarding Hayes were disclosed to the defense, the defense might seek to call him for the sole purpose of bringing out impeachment evidence. The government asserted that Evidence Rule 608 would not allow the evidence to be used in this way. The motion did not anticipate any other arguments the defense might raise regarding the discoverability of the withheld evidence.[6]

Bruce filed a motion for new trial after Hayes was indicted. The motion argued the government had been aware that Hayes was a target in the Victorville investigation and that it violated its duty to disclose this information. More specifically, Bruce charged the government "purposefully crafted" its case to avoid relying on Hayes so it could withhold evidence reinforcing Bruce's theory that a different culprit was responsible for smuggling contraband into Atwater. *See* *U.S. v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Bruce cited post-trial interviews with inmates Rush and Randolph as proof that Hayes had been extensively involved in the Atwater investigation and contended the government's pre-trial motion left the district court in the dark by minimizing Hayes's involvement in the investigation into Bruce's smuggling. In response, the government conceded it had intentionally avoided calling Hayes as a witness because it knew Hayes was subject ***894** to being impeached, but the government maintained it had complied with *Brady*.

During the hearing on Bruce's motion for new trial, the district court took issue with the government's pre-trial description of the role Hayes played in the Atwater investigation. The court described the government's pretrial motion as creating "the impression that ... Hayes was just one of the officers who happened to be present at the ... checkpoint," and observed that the government's pre-trial motion "le[ft] out any other involvement by Hayes" in the investigation. The court questioned why the government presented such sparse details in its pre-trial motion, and suggested that it might have "thought a little harder" about the motion had it known the full extent of Hayes's involvement. The government again conceded that "additional facts [ ] could have been provided" in the ex parte motion, but it argued the undisclosed information did not satisfy *Brady*'s materiality test because it did not negate any of the evidence against Bruce. The government stressed that it understood Hayes had played only a small role in developing the case against Bruce at the time it prepared its ex parte motion. The government also repeated its argument that Bruce would not have been able to introduce evidence of Hayes's misconduct.

The district court agreed with the government that there had been no *Brady* violation. The court ruled there was "overwhelming evidence that support[ed] the jury's verdict

[against Bruce] completely and totally," and it pointed out that no witness had recanted his trial testimony, and that the post-trial interviews did not controvert any of the government's other evidence. The court found "nothing to support" Bruce's theory that Hayes was the real perpetrator at Atwater, and it denied Bruce's motion for new trial.

A.

In *Brady v. Maryland*, the Supreme Court held that prosecutors must disclose to the defense "evidence favorable to an accused ... [that] is material either to guilt or to punishment" prior to trial. 373 U.S. at 87, 83 S.Ct. 1194. This duty extends "irrespective of the good faith or bad faith of the prosecution." *Id.* We have explained that failing to disclose material, favorable evidence violates due process because it compromises the integrity of the defendant's trial. *United States v. Shaffer*, 789 F.2d 682, 687 (9th Cir. 1986). For this reason, "[t]he prosecution's duty to disclose favorable evidence is not dependent upon a request from the accused, and even an inadvertent failure to disclose may constitute a violation."*Bailey v. Rae*, 339 F.3d 1107, 1113 (9th Cir. 2003) (citing *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

The second part of the *Brady* test—that the non-disclosed evidence be "material"—limits *Brady's* reach. *See id.* ("To be sure, not every violation of the duty to disclose constitutes a *Brady* violation."). "[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375; *see also Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

To succeed on his *Brady* claim, Bruce was required to show: (1) the evidence at issue was favorable to him, either because it was exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and ***895** (3) that he was prejudiced. *Shelton v. Marshall*, 796 F.3d 1075, 1083 (9th Cir.) (quoting *Strickler*, 527 U.S. at 281–82, 119 S.Ct. 1936) *amended on reh'g*, 806 F.3d 1011 (9th Cir. 2015). Because there is no doubt the government did not disclose the challenged evidence, we consider only whether it was exculpatory and material.

B.

Bruce identifies two categories of undisclosed information from the government's motion in limine that he contends are exculpatory: (1) evidence that Hayes was a target of an investigation into a very similar smuggling ring at Victorville; and (2) evidence showing that numerous inmate complaints had been made against Hayes prior to the Bruce investigation. Somewhat more obliquely, Bruce suggests the government should have disclosed that Hayes pressured some inmates to offer evidence against Bruce.

Exculpatory evidence includes evidence that is favorable to the defense, meaning "evidence that tends to prove the innocence of the defendant." *Amado v. Gonzalez*, 758 F.3d 1119, 1134 (9th Cir. 2014); *United States v. Cano*, 934 F.3d 1002, 1023 (9th Cir. 2019) (observing that *Brady* requires the government disclose "material, exculpatory, or otherwise helpful" evidence). "Any evidence that would tend to call the government's case into doubt is favorable for *Brady* purposes." *Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013) (citing *Strickler*, 527 U.S. at 290, 119 S.Ct. 1936); *see also United States v. Bundy*, 968 F.3d 1019, 1038–39 (9th Cir. 2020) (citing *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555) (evidence showing tactical units surrounding property where defendants were engaged in standoff with federal officers, and evidence showing government surveillance of the property, was exculpatory because it rebutted government's theory that defendants did not fear government snipers). "To say that evidence is 'exculpatory' does not mean that it benefits the defense in every regard or that the evidence will result in the defendant's acquittal." *Bailey*, 339 F.3d at 1115. Rather, "exculpatory" connotes a broader category of evidence that, "if disclosed and used effectively, [ ] may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676, 105 S.Ct. 3375; *see Bailey*, 339 F.3d at 1115 (granting new trial where government failed to disclose reports casting doubt on star witness's testimony, and rejecting argument that certain passages "somehow negate[d] the documents' exculpatory nature").

The obligations imposed by *Brady* are not limited to evidence prosecutors are aware of, or have in their possession. Rather, individual prosecutors have "the duty to learn of any favorable evidence known to others acting on the government's behalf" as part of their "responsibility to gauge

the likely net effect of all such evidence" to the case at hand. *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555.

Here, the government argues the withheld evidence concerning Hayes was not exculpatory because it "was not material to Bruce's guilt or innocence" and did not negate the other evidence against Bruce. This conflates *Brady*'s exculpatory and materiality requirements.[7] *Bagley*, 473 U.S. at 676, 105 S.Ct. 3375. On appeal, the ***896** government suggests the evidence would not have been admissible pursuant to Rule of Evidence 401 or Rule 403, but this argument also misses the mark. The standard for relevance is easily met because evidence that one of Bruce's co-workers was accused of engaging in a very similar prison smuggling ring makes it somewhat more probable that a third party was responsible for the crimes Bruce was accused of committing. Fed. R. Evid. 401. The government did not raise a Rule 403 objection in the trial court, thereby forfeiting that issue.

In the trial court and on appeal, the government's response failed to acknowledge its broader ethical responsibility. *See Turner v. United States*, —— U.S. ——, 137 S. Ct. 1885, 1893, 198 L.Ed.2d 443 (2017) (observing "government's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done"); *see also Kyles*, 514 U.S. at 437–40, 115 S.Ct. 1555 (recognizing "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable" and for that reason, "a prosecutor anxious about tacking too close to the wind" will err on the side of disclosure in order to "justify trust in the prosecutor" and to "preserve the criminal trial ... as the chosen forum for ascertaining the truth about criminal accusations"); *see also id.* (observing the ABA Standards for Criminal Justice "call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate").

Bruce persuasively argues that evidence of Hayes's smuggling at Victorville was exculpatory because it supported the defense theory that a third party was responsible for the crimes he was accused of committing. *See United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007); *Kyles*, 514 U.S. at 421, 115 S.Ct. 1555 (observing that *Brady* "turns on the cumulative effect of all such evidence suppressed"). He argues this is particularly so if the evidence that Hayes was a target in the Victorville investigation is viewed in conjunction with the other withheld evidence concerning Hayes.

The government strenuously argues it was entitled to structure its case to avoid producing evidence that could have been used to impeach Hayes and that it was free to do so because it had no obligation to call Hayes as a witness. But the fact the government took the step of filing an ex parte motion seeking the court's permission not to disclose evidence of Hayes's misconduct undercuts the suggestion that the government had no reason to question whether the undisclosed evidence was exculpatory. *See Kyles*, 514 U.S. at 439, 115 S.Ct. 1555 (explaining the prudent prosecutor's better course is to take care to disclose any evidence favorable to the defendant in order to comply with *Brady*). We agree the government had no obligation to call Hayes as a witness, but the government still bore the burden of investigating whether potentially exculpatory evidence existed. *See Browning v. Baker*, 875 F.3d 444, 459 (9th Cir. 2017) (quoting *Strickler*, 527 U.S. at 280, 119 S.Ct. 1936) (emphasizing prosecution's special status in criminal justice system heightens its burden of disclosure).

The government separately argues it cannot be held responsible for disclosing the extent of Hayes's involvement in the Atwater investigation because the government had no way of knowing that Hayes had contact with Atwater inmates who witnessed or participated in the Atwater scheme. Our case law also forecloses this argument. "Because prosecutors are in a 'unique position to obtain information known to other agents of the government,' " they have an obligation to "disclose ***897** what they do not know but could have learned." *Cano*, 934 F.3d at 1023 (alterations omitted). Prosecutors cannot turn a blind eye to their discovery obligations.

We are not persuaded by the government's separate contention that because Hayes and Rush were identified in the documents the government did produce, it was incumbent upon the defense to investigate Hayes and Rush and uncover potentially favorable evidence itself. This argument overlooks that Bruce's counsel had no reason to suspect that further discovery into Hayes's participation in the Atwater investigation could have yielded information supporting the defense theory. *Kyles*, 514 U.S. at 437, 115 S.Ct. 1555.

Our conclusion that the government fell short of meeting its *Brady* discovery obligation here is influenced by the ex parte motion the government filed before trial. In it, the government memorialized its awareness that Hayes was present when Jones's vehicle was stopped and that Hayes was under investigation for introducing contraband into another federal prison in a very similar smuggling operation. Hayes was observed meeting an inmate's girlfriend in a Home

Depot parking lot and accepting a small package from her. The motion also disclosed to the court that the government possessed an email exchange in which the inmate instructed his girlfriend to meet an SUV matching the description of Hayes's SUV. In short, by the time the government filed its motion seeking permission to withhold evidence of Hayes's alleged misconduct, it knew Hayes was suspected of running a prison smuggling ring using the same method Bruce was accused of using at Atwater. In addition, the government was undoubtedly aware that Hayes held a supervisory position at Atwater while Bruce's investigation was ongoing, and the government knew that its main trial witness, Rush, had been moved to segregated housing and questioned by prison officials. Whether memorialized in an investigation report or not, the government was certainly in a position to know Hayes was one of the officers who questioned Rush. Indeed, Rush volunteered in his trial testimony that Hayes was one of the officers who moved him to segregated housing and threatened to keep him there if Rush did not testify against Bruce. Despite the stark similarities between the Atwater scheme and what was known about the smuggling at Victorville, the record does not show, and the government does not argue, that it ever followed up to learn what role Hayes played in the Atwater investigation, nor that the government took any steps to determine whether the two smuggling rings were in fact unrelated.[8]

The government's pretrial submission to the district court limited its "Expected Defense Arguments" to a one-sentence assertion that if the evidence were produced, the defense might seek to call Hayes for the sole purpose of bringing out impeachment information. Neither the ex parte motion nor the transcript of the argument held on Bruce's motion for new trial show the government ever took any steps to ***898** verify that the two smuggling rings were separate. Nor does the government argue on appeal that it considered whether exculpatory material might exist. The government collapses *Brady*'s three-part test into an examination of materiality.

The district court was not persuaded the withheld evidence was exculpatory, largely because Hayes was accused of smuggling after Bruce's smuggling had been uncovered and because Hayes was accused of smuggling at Victorville rather than Atwater. Respectfully, we disagree. The responsibility imposed by *Brady* includes looking beyond evidence in the prosecutor's file; there were striking similarities between the two smuggling operations; Hayes was directly involved in the Atwater investigation that led to Bruce's arrest and had access to some of the witnesses who testified against Bruce; and Bruce's trial theory argued someone else was responsible for the smuggling at Atwater. Under the facts presented, we conclude this evidence was exculpatory within the meaning of *Brady* and at the very least the government was required to investigate it.

C.

We evaluate the trial as a whole to determine whether the "admission of the suppressed evidence would have created a reasonable probability of a different result." *United States v. Price*, 566 F.3d 900, 911 (9th Cir. 2009) (internal quotation marks omitted). "In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial." *Jernigan*, 492 F.3d at 1054 (internal quotation marks omitted); *see Comstock v. Humphries*, 786 F.3d 701, 711–12 (9th Cir. 2015) (reversing conviction where lack of direct evidence combined with suppression of a witness's "expressed doubts and recollections" "substantially diminished, if not defeated" the state's ability to prove guilt beyond a reasonable doubt). Evidence is sometimes considered material if the government's other evidence at trial is circumstantial, or if defense counsel is able to point out significant gaps in the government's case through cross-examination, or if witnesses provided inconsistent and inaccurate testimony. *See Bailey*, 339 F.3d at 1115–16 (granting new trial where suppressed report went "to the heart of [the accused's] defense and without it" the verdict was not "worthy of confidence").

Our decisions in *Jernigan* and *Price* are instructive. In *Jernigan*, we remanded for a new trial because the government did not disclose the existence of another bank robber for whom the defendant "may well have been mistaken." 492 F.3d at 1055. When considered with other inconsistencies in witness testimony and the lack of direct evidence against Jernigan, the omitted evidence suggested the defendant may have been innocent. In *Price*, our court remanded for a new trial because the prosecution failed to disclose its star witness's past convictions, which could have been used to undermine his credibility. The government's only direct evidence of Price's guilt came from this witness's testimony and in its closing argument, the government urged that the witness had no reason to lie. We explained that this created a "central weakness" for the defense. 566 F.3d at 913–

14. Coupled with Price's showing that the government's other evidence was circumstantial and inconsistent, we concluded the undisclosed information was material. *Id.*

Bruce argues the information the government failed to disclose was material because it would have allowed the jury to ***899** find reasonable doubt about whether Hayes was responsible for the smuggling operation at Atwater. He contends there is a substantial likelihood the verdict would have been different if the jury had heard that Hayes was suspected of smuggling at Victorville and knew that, as a supervisor at Atwater, Hayes had access to the witnesses who testified against him. Bruce also suggests the investigation reports suspiciously failed to document Hayes's involvement in the Atwater investigation, and maintains this fact could have been used to buttress his defense theory that there was reasonable doubt about his guilt. *See Kyles*, 514 U.S. at 420, 115 S.Ct. 1555 (holding the State's disclosure obligation turns on the cumulative effect of all suppressed evidence favorable to the defense).

Our task is to compare the evidence against Bruce with the gaps in the evidence presented to the jury to determine whether the undisclosed evidence undermines our confidence in the outcome. *See Price*, 566 F.3d at 911. We conclude it does not. First, though the jury did not have all the details, it was aware that Rush was pressured to testify against Bruce. Rush told the jury as much, volunteering that Hayes was one of the officers who moved Rush into segregated housing and threatened to keep him there if he did not testify. Rush also testified that he felt additional pressure because officials interviewed his girlfriend and his relatives during their investigation. The jury was not left with conflicting testimony about the prison officials' efforts to uncover the extent of the smuggling ring. The investigators corroborated Rush's account that he was moved to segregated housing, and they testified that another inmate expressed that investigators threatened his mother and brother during follow-up questioning.

The evidence against Bruce was substantial and we agree with the district court that in their post-trial interviews neither Jones nor Rush recanted their testimony about Bruce's involvement. By the district court's account, Rush "very credibly claimed" at trial that he and Bruce were friends, which was why Rush resisted cooperating with investigators. The district court described Rush as demonstrating "no joy in testifying against Mr. Bruce," and observed that Jones was "quite, quite credible," and that his testimony had been "devastating" to Bruce. Considerable circumstantial evidence also implicated Bruce. Atwater investigators described Jones's account of the checkpoint stop and that Bruce showed up, at the appointed time, for the meeting Jones arranged after he agreed to cooperate. Representatives from Western Union and T-Mobile linked Bruce to monetary transactions from Atwater inmates' friends and family members, and also linked Bruce to the cell phone used to communicate with Jones.

Bruce testified that his financial dealings with inmates showed only that he engaged in sports gambling with them, but the jury was not required to credit this testimony. Bruce did not deny that he had accepted money from inmates, or that the cell phone was used to arrange meetings to pass the contraband. Unlike *Price*, the government's case did not bank on a single star witness; Rush and Jones corroborated each other's accounts and their testimony was heavily corroborated by other evidence. 566 F.3d at 913–14; *see, e.g.*, *Comstock*, 786 F.3d at 711–12; *Bailey*, 339 F.3d at 1115–16. The weight and force of the evidence against Bruce sets this case apart from others in which we have found *Brady*'s materiality element satisfied.

Though Bruce suggests the withheld evidence would have opened the door for the jury to hear that Hayes was smuggling drugs into Atwater, he offers no real evidence that Hayes did smuggle contraband ***900** into Atwater. Bruce's speculation that Hayes may have been left alone with Jones or his wife fares no better. He implies that Hayes may have had an opportunity to influence their statements, but the investigating officers' testimony suggests several investigators were present when Jones and his wife were questioned.

Because we view the trial as a whole, our confidence in the verdict is not undermined by the government's failure to disclose that Hayes was a subject of an investigation at Victorville, that numerous inmates had complained about him, and the extent of his involvement in the Bruce investigation. The district court did not err by denying Bruce's motion for a new trial.

AFFIRMED.

All Citations

984 F.3d 884, 114 Fed. R. Evid. Serv. 828, 21 Cal. Daily Op. Serv. 617, 2021 Daily Journal D.A.R. 397

Footnotes

* The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

1 We recognize there is some tension in our case law concerning the correct standard of review for these appeals. *See United States v. Endicott*, 803 F.2d 506, 514 (9th Cir. 1986). The outcome here does not depend on the standard of review.

2 Tracy Jones did not testify and the record is silent as to whether she accompanied Thomas to the meetings with Officer Johnson, or was otherwise able to identify him.

3 The record indicates Bruce is five-feet ten-inches tall.

4 Bruce also made passing mention of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *United States v. Henthorn*, 931 F.2d 29 (9th Cir. 1991), but on appeal, he frames his claim as a *Brady* argument.

5 On appeal, Bruce repeatedly asserts that Hayes found the contraband in Jones's car, but as the district court recognized, the record shows a different officer found the drugs.

6 *But see*Dep't of Justice, Policy Regarding Disclosure of Exculpatory and Impeachment Information: Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required, 9-5.001(C) (2020), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#:~:text=Brady%20v.,material%20to%20guilt%20**or**%20punishment. (requiring disclosure of qualifying evidence without regard to admissibility). The same policy requires disclosure of qualifying evidence without regard to materiality. *Id.*

7 The government cites *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) in support of its argument. *Agurs* addresses materiality, not the standard for determining whether evidence is exculpatory, and the three materiality standards articulated in *Agurs* have since been overruled. *United States v. Shaffer*, 789 F.2d 682, 687 (9th Cir. 1986).

8 Post-trial, Randolph suggested it was “common knowledge” Hayes was involved in smuggling at Atwater. But the record on appeal does not show whether Randolph ever admitted to having personal knowledge about any smuggling. Nevertheless, contrary to the government's suggestion, it is plain the government knew the Victorville operation was remarkably similar to the one at Atwater and the government could have learned that Hayes played a role in the Atwater investigation that went beyond the checkpoint stop and included having contact with inmates who were accused or admitted to participating in the scheme.

951 F.3d 920
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

David Tachay HEARD, also known as Tashay, also known as Kill Bro Heard, also known as Kill Bro, Defendant - Appellant

No. 18-3411
|
Submitted: November 15, 2019
|
Filed: March 3, 2020
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Rehearing and Rehearing En Banc Denied April 21, 2020*

Synopsis

Background: Defendant was convicted in the United States District Court for the Northern District of Iowa, Linda R. Reade, Senior District Judge, of possessing a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year, possession with intent to distribute a controlled substance, possession of a firearm in furtherance of a drug trafficking crime, and possessing a stolen firearm. Defendant appealed.

Holdings: The Court of Appeals, Benton, Circuit Judge, held that:

show-up identification at crime scene was admissible;

the district court's failure to provide a jury instruction on the value of identification testimony did not constitute prejudicial error;

the district court was not required to hold a *Faretta* hearing before it allowed defendant to give his own closing argument; and

evidence was sufficient to support convictions for possessing with intent to distribute a controlled substance and possessing a firearm in furtherance of a drug trafficking crime.

Affirmed.

***922** Appeal from United States District Court for the Northern District of Iowa - Cedar Rapids

Attorneys and Law Firms

Lyndie Freeman, Assistant U.S. Attorney, U.S. Attorney's Office, Timothy Vavricek, Lisa C. Williams, Assistant U.S. Attorneys, U.S. Attorney's Office, Northern District of Iowa, for Plaintiff-Appellee.

David Tachay Heard, pro se.

Raphael M. Scheetz, Cedar Rapids, IA, for Defendant-Appellant.

Before COLLOTON, WOLLMAN, and BENTON, Circuit Judges.

Opinion

BENTON, Circuit Judge.

***923** A jury convicted David Tachay Heard on four counts: (1) possessing a firearm in violation of 18 U.S.C. § 922(g)(1) and § 924(a)(2); (2) possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(D), and § 851; (3) possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A) and § 924(c)(1)(C)(i); and (4) possessing a stolen firearm in violation of 18 U.S.C. § 922(j) and § 924(a)(2). He appeals the conviction. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

On the evening of July 30, 2017, Justin Summers was a passenger in the front seat of an SUV driven by his wife on Redbud Road. Around 7:20 pm, he called 911 reporting he had just seen a parked car with "substantial front-end damage." Next to the driver's side of the car was a man Summers described as a "black male," "anywhere from maybe 5'9" to 6-foot," with a white hat and dark clothes. Summers saw the man throw something "small" into "the weeds" on the side of Redbud Road.

Concerned, Summers and his wife "came really slow up on the car ... looking to see if he needed some help or if there was anybody else in the car that needed help." The man "tipped his head back so [Summers] could see his face really good"

and "very clearly." He was "looking for something in his passenger side" and "was very agitated, more so than what you would be if you were in an accident." Summers and his wife "slowed down almost to a stop next to his car and he basically through a facial expression made it very clear that he didn't want us there." As Summers and his wife drove away, Summers saw the man throw "a semiautomatic pistol into the ... weeds or the ditch there." Summers said no one else was in the car or "around at all."

Arriving at the scene, police found Heard, who is five-foot-eight-inches tall, wearing a black t-shirt and blue jeans. They searched the wooded area near the car and found a bag of marijuana with 27 individually packaged baggies and a fully loaded "extremely clean" firearm with "no dirt or debris on it." They arrested Heard.

Around 8:45 pm, officers asked Summers to return to the scene. He arrived at dusk. Officers positioned Heard (handcuffed with a spotlight shining on him) 20 to 25 feet from Summers. Officers told Summers "to have an open mind, and to tell them if it was or was not the person that [he] saw." Summers "didn't hesitate," saying that "everything was exactly the same about him, except that ... he was not wearing the hat." During the identification, Heard gave Summers the "same hard looks" he had given him earlier in the evening.

The next evening, Heard called his girlfriend from jail. The call was recorded. Heard told her that Summers would not have been able to identify him because he was not wearing his hat during the identification process.

***924** During the investigation, police learned that the firearm belonged to Heard's cousin. When interviewed, the cousin said he kept the firearm in his basement and had not given Heard permission to take it. However, the cousin said Heard had visited the basement to "make music."

Before trial, the district court[1] denied Heard's motion to suppress Summers' eyewitness identification. The court also declined to give a jury instruction on eyewitness-identification testimony. At trial, the government introduced evidence including: (1) Summers' testimony; (2) the transcript of Heard's call to his girlfriend from jail; (3) the ownership of the firearm; (4) testimony of a cooperating witness that Heard had sold him a firearm, tried to sell him the firearm found at the scene, and possessed and offered to sell marijuana; and (5) testimony of Heard's girlfriend's mother that she gave him $10,300 to pay back loans for people who "want their money back," "are not messing around," and beat him up for failure to pay.

Heard moved for judgment of acquittal after the submission of the government's evidence stating, "[W]e would move for a judgment of acquittal. I would focus on Count 4, the possession of a stolen firearm in this case." At the conclusion of all evidence, Heard renewed his motion, stating, "[T]he defendant would renew the motion, specifically as to Count 4, that's—that's the one that has controversy about it. There's certainly evidence on 1, 2, and 3, even though we would not say it's going to be sufficient, but I still think there is significant threshold problems that the government has on Count 4." The district court denied the motion.

After the government's closing argument, Heard's counsel informed the court that Heard himself wanted to deliver his closing argument. The court immediately excused the jury. Outside the presence of the jury, Heard's attorney reiterated that Heard "desires, demands, to present the closing argument in this case." His attorney advised him that he must "stay within the evidence that has been presented" and not "testify about things that have not been previously presented." He also advised that he "runs the risk that, if he goes outside those boundaries, that the Court could potentially strike his statement and not allow any sort of potential closing statement to be made by the defense in this case." The government responded, voicing "significant concerns based on his behavior yesterday after the Court repeatedly instructed him to stop doing things and he kept doing it, talking over counsel and talking over the Court."

The court then explained the procedure for closing argument. It warned Heard that if he violated orders, he would not be allowed to finish the closing argument. The court also cautioned him:

> Closing arguments are very important in a case, and they have to be delivered in a way that is convincing, courteous, civil, but persuasive. And [defense counsel] has gone to law school. He has appeared for defendants in my court for 15 years and other judges of this district. He knows what juries will believe and what they won't believe.
>
> ....
>
> I think that you are making a huge mistake, but the Constitution does guarantee you the right to make this closing argument if you want to.
>
> ....

> ***925** [The defendant] knows the ups and downs and apparently has made his own decision that this is what he wishes to do. And although I don't agree with his analysis of what's best for him, it's his life, so I will permit it, provided that he abide by the Court's rules.

The court then conducted an ex parte hearing with Heard and his attorney. His attorney said:

> Certainly, I would say he's running a very significant risk by choosing to make his own closing argument. Mr. Heard, however, has frequently throughout my representation indicated his knowledge of the facts and circumstances. ... [H]e certainly is well aware of the circumstances and facts of this particular matter, and he has that constitutional right.

The court concluded by asking, "And is it your desire, Mr. Heard, in fact, your demand, that you be permitted to make your own closing argument?" Heard answered, "Yes, ma'am. I just need about—yes, Your Honor. I just need maybe 10 minutes to just—to just get my delivery together." The court granted the request. Heard gave his closing argument. After the government's closing argument, Heard renewed his motion for judgment of acquittal, stating "We would again renew the motions previously made at the close of the evidence for a judgment of acquittal, especially as to Count 4." The court denied the motion.

The jury convicted Heard on all four counts. Heard did not renew his motion for judgment of acquittal. He appealed, challenging the conviction and arguing: (1) the district court erred in admitting eyewitness-identification evidence; (2) the district court abused its discretion in failing to instruct the jury on eyewitness identification; (3) the trial violated his Sixth Amendment right to counsel; and (4) the evidence was insufficient to convict.

I.

Heard believes the district court erred in admitting Summers' eyewitness testimony. He complains the "show-up" identification was "clearly impermissibly suggestive" because officers called Summers back to the scene of the crime, asking him suggestive questions while Heard was handcuffed with a bright light shining "directly" on his face. This court reviews the denial of a motion to suppress de novo, but reviews "underlying factual determinations for clear error, giving due weight to the inferences of the district court and law enforcement officials." ***United States v. Leon***, 924 F.3d 1021, 1025 (8th Cir. 2019).

"Police officers are not limited to station house line-ups if there is an opportunity for a quick, on-the-scene identification. Show-up identifications are essential to free innocent suspects and to inform the police if further investigation is necessary. Thus, even if the line-up is inherently suggestive, the line-up will be admissible as long as it is not impermissibly suggestive *and* unreliable." ***United States v. Mitchell***, 726 F. Appx. 498, 501 (8th Cir. 2018) (cleaned up). *See generally* ***Sexton v. Beaudreaux***, —— U.S. ——, 138 S. Ct. 2555, 2559, 201 L.Ed.2d 986 (2018) ("To be impermissibly suggestive, the procedure must give rise to a very substantial likelihood of irreparable misidentification." (internal quotation marks omitted)).

The show-up identification here was not impermissibly suggestive. "Necessary incidents of on-the-scene identifications, such as the suspects being handcuffed and in police custody" or having a light shone on their face "do not render the identification procedure impermissibly suggestive." ***926** ***United States v. House***, 823 F.3d 482, 488 (8th Cir. 2016). *See* ***United States v. Pickar***, 616 F.3d 821, 828 (8th Cir. 2010) (holding that a show-up identification was not unduly suggestive where the defendant "was handcuffed and standing in front of a marked police cruiser," "stood between an officer in uniform and an officer in plainclothes," and "one of the officers [was] shining a small flashlight in [the defendant's] face").

The identification also was not unreliable. An identification is unreliable if the circumstances allow for "a very substantial likelihood of irreparable misidentification." ***House***, 823 F.3d at 487. "The factors affecting reliability include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation." ***Sexton***, 138 S. Ct. at 2559 (internal quotation marks omitted). Here, Summers paid close attention to Heard due to the severe damage to his car. Summers observed him at a close distance, in good light, and "could see his face really good." Summers testified that Heard gave him "a threatening hard look" and "made it very clear that he didn't want us there." Only about an hour and a half passed between when Summers first saw Heard and when he made the identification.

The district court did not err in admitting the eyewitness identification. ***Mitchell***, 726 F. Appx. at 502 (upholding the admission of a "show-up identification" where the witnesses "had the opportunity to observe" the defendant, "they were able to confidently identify him based on a distinctive outfit that he was wearing," and "little time elapsed" between the crime and the identification).

II.

Heard maintains the district court abused its discretion in refusing to give Eighth Circuit Model Jury Instruction 4.08 Eyewitness Testimony on the "value of identification testimony." **Eighth Circuit Manual of Model Jury Instructions (Criminal) 4.08** (2018). This court reviews the refusal to submit a proffered jury instruction for abuse of discretion. ***United States v. Waits***, 919 F.3d 1090, 1093 (8th Cir. 2019). District judges have "wide latitude" in formulating jury instructions. ***United States v. Amaya***, 731 F.3d 761, 771 (8th Cir. 2013). Jury instructions are sufficient "if they fairly and adequately submitted the issues to the jury." ***Id.***

"It is reversible error for a trial court to refuse this specific jury instruction where the government's case rests solely on questionable eyewitness identification." ***United States v. Mays***, 822 F.2d 793, 798 (8th Cir. 1987). Here, however, the government's case did not rely solely on the eyewitness identification. The evidence showed: (1) police found a firearm in the wooded area next to Heard's car; (2) the firearm belonged to Heard's cousin; (3) Heard had $340 in cash on him when arrested; (4) Heard had prior convictions for drug distribution and possession of firearms; and (5) Heard owed large sums of money to people who beat him up for failure to pay. "Although the district judge might well have given such an [eyewitness] instruction, in view of the other corroborating evidence of [the defendant's] guilt ... the district court did not commit prejudicial error in refusing to do so." ***Id.*** *See* ***United States v. Cain***, 616 F.2d 1056, 1058-59 (8th Cir. 1980) (affirming a conviction despite the lack of an eyewitness-identification instruction because the identification was corroborated by other testimony).

***927** III.

Heard argues his "right to counsel was violated when the district court permitted him to give his own closing argument without the proper colloquy."

The parties dispute the applicable standard of review. Heard contends review is de novo. *See* ***United States v. Turner***, 644 F.3d 713, 720 (8th Cir. 2011) ("This court reviews de novo a district court's decision to allow a defendant to proceed pro se."). The government seeks plain error review because Heard "never filed a new trial motion asserting error in the district court's decision to grant his request to give his own closing argument." Alternatively, the government asserts this court should review for abuse of discretion. *See* ***United States v. Garrett***, 898 F.3d 811, 817 (8th Cir. 2018) ("The district court has broad discretion in controlling closing arguments, and we will not reverse absent an abuse of discretion."). This court need not decide which standard applies because Heard's claim fails under all of them.

Heard believes the district court did not "provide the proper colloquy for waiver of counsel." However, Heard did not fully waive his right to counsel. "A defendant does not have a constitutional right to simultaneously proceed pro se *and* with the benefit of counsel. However, district courts have discretion to permit 'hybrid representation' arrangements whereby a defendant takes over some functions of counsel despite being represented." ***Fiorito v. United States***, 821 F.3d 999, 1003-04 (8th Cir. 2016) (cleaned up). As this court has explained:

> Such hybrid representation arrangements create significant problems in analyzing the issue of waiver of counsel. Where a defendant seeks to represent himself entirely without a lawyer, he must knowingly and intelligently waive his right to counsel. ***Faretta***, 422 U.S. at 835, 95 S. Ct. 2525. However, courts of appeals analyzing hybrid representation arrangements have disagreed as to when a defendant's conduct triggers the waiver of his right to counsel. *Compare* ***United States v. Leggett***, 81 F.3d 220, 224 (D.C. Cir. 1996) (holding that defendant in hybrid representation arrangement does not waive his right to counsel unless he makes "an articulate and unmistakable demand ... to proceed *pro se*") *with* ***United States v. Turnbull***, 888 F.2d 636, 638 (9th Cir. 1989) (holding that defendant must knowingly and intelligently waive his right to counsel before he assumes any of the "core functions" of counsel). Further, courts that have held that a waiver is necessary for hybrid representation have disagreed about what procedures are required before a defendant's waiver is knowing and intelligent. While some courts have required *Faretta* warnings any time a hybrid-represented defendant waives his right to counsel, *see, e.g.*, ***United States v. Davis***, 269 F.3d 514, 518-20 (5th Cir. 2001), we have held that

such warnings are not required when "the defendant had the required knowledge [about the dangers of proceeding *pro se*] from other sources." ***Yagow***, 953 F.2d at 431.

Id. at 1004. Like the defendant in *Fiorito*, Heard believes that "despite retaining counsel ... the court was required to hold a *Faretta* hearing before granting his requests [to give his own closing argument] to ensure that his purported waiver of counsel was knowing and intelligent. ... [B]ecause the court erred by failing to hold this hearing to warn him about the dangers of proceeding *pro se*, he was deprived of his Sixth Amendment right to counsel." ***Id.***

This argument is without merit. Heard was represented by counsel who repeatedly advised him not to give his own closing ***928** argument. Because he "was represented by counsel and received counsel's advice, he did not waive his right to counsel, and the district court had no duty to conduct a *Faretta* hearing." ***Id.*** at 1005.

Even if construed as a waiver of his right to counsel, Heard's claim fails. "[N]either the Supreme Court nor this court has ever adopted a list of essential points that must be conveyed to a defendant in order for a waiver of counsel to be deemed knowing and voluntary." ***United States v. Tschacher***, 687 F.3d 923, 932 (8th Cir. 2012). "The adequacy of the waiver depends on the particular facts and circumstances of each case, including the background, experience, and conduct of the accused." ***Id.*** at 931. This court "will uphold a waiver of counsel absent specific warnings when the record as a whole demonstrates that the defendant knew and understood the disadvantages of self-representation." ***Fiorito***, 821 F.3d at 1006 (internal quotation marks omitted). "The record clearly shows that [Heard's] alleged waiver was knowing and intelligent." ***Id.*** The district court spoke with Heard at length about his request to give his own closing argument and made clear that the request was a "huge mistake." Heard's attorney also advised against the "significant risk" of delivering his own closing argument. The district court sufficiently apprised Heard of his right to counsel and of the possible consequences of forgoing that right.

IV.

Heard contends there was insufficient evidence to convict on Counts 2 and 3 because the evidence did not show he possessed marijuana. When a defendant properly moves for judgment of acquittal in the district court, this court reviews de novo, "viewing the evidence and all reasonable inferences in the light most favorable to the jury's verdict." ***United States v. Waloke***, 923 F.3d 1152, 1155 (8th Cir. 2019). Under this standard, a "judgment of acquittal" is appropriate "only when no reasonable jury could have found the defendant guilty beyond a reasonable doubt." ***Id.*** However, when a defendant fails properly to move for judgment of acquittal in the district court, plain error review applies. ***United States v. Calhoun***, 721 F.3d 596, 600 (8th Cir. 2013). "To demonstrate plain error, [defendant] must show (1) error, (2) that was plain, (3) that affects [his] substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." ***Id.***

Heard asserts he moved for judgment of acquittal on all counts, and this court should review his claim de novo. The government disagrees, advocating plain error review. *Compare* ***United States v. Huntley***, 523 F.3d 874, 875 (8th Cir. 2008) (reviewing for plain error where the defendant failed to filed a "post-verdict motion for judgment of acquittal"), *with* ***United States v. Yarrington***, 634 F.3d 440, 449 (8th Cir. 2011) (reviewing de novo where the defendant moved for judgment of acquittal at the close of evidence but not after the verdict). This court need not decide the issue because Heard's claim fails under either standard.

Both Counts 2 and 3 required that Heard possess marijuana. The evidence showed: (1) Summers saw Heard throw two objects from his car into a nearby wooded area; (2) police found a firearm belonging to Heard's cousin and a distribution quantity of marijuana in the wooded area; (3) Heard has prior federal marijuana-related convictions; (4) Heard had $340 in cash on him when police arrested him; (5) Heard previously had sold firearms and offered to sell marijuana; and (6) Heard owed large sums of money to people who beat him up for failure to pay. The bag of ***929** marijuana did not have Heard's fingerprints on it. However, law enforcement testified that this is common because "[d]rug packaging is one of the hardest items to find latent prints on." Similarly, the bag did not have Heard's DNA. But law enforcement testified that "no DNA tests were taken from that bag" because "the success [of] touch DNA on those types of items is extremely low." The lack of DNA and fingerprint evidence is not dispositive. *See, e.g.*, ***United States v. Porter***, 687 F.3d 918, 921 (8th Cir. 2012) (holding evidence was sufficient on a firearm conviction despite a "lack of fingerprints or DNA found on the firearm," and noting that examiners find "fingerprints on firearms" in only "three to five percent of cases"). Viewing the evidence most favorably to the verdict, there was sufficient

evidence to show he possessed the marijuana. The district court did not err, let alone plainly err.[2]

* * * * * * *

The judgment is affirmed.

All Citations

951 F.3d 920

Footnotes

* Judge Kelly did not participate in the consideration or decision of this matter.

1 The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa.

2 In his reply, Heard argues the Supreme Court's decision in *Rehaif v. United States*, —— U.S. ——, 139 S. Ct. 2191, 204 L.Ed.2d 594 (2019) requires dismissal of Count 1 because the jury was not instructed that the government was required to prove that Heard knew he was a convicted felon prohibited from possessing a firearm. *See* ***Rehaif v. United States***, —— U.S. ——, 139 S. Ct. 2191, 2200, 204 L.Ed.2d 594 (2019) ("[I]n a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm."). Because Heard "failed to challenge the lack of a jury instruction regarding his knowledge of his felony status," this court reviews "his claim for plain error." ***United States v. Hollingshed***, 940 F.3d 410, 415 (8th Cir. 2019). Heard cannot satisfy elements three and four of the plain-error test. At trial, he admitted he pled guilty to the felonies of possession with intent to distribute marijuana and possession of firearms and served a term of imprisonment exceeding one year. "These facts ... indicate that [Heard] knew he had been convicted of 'a crime punishable by imprisonment for a term exceeding one year.' " ***Id.*** at 416, *quoting* **18 U.S.C. § 922(g)(1)**. He thus cannot "show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." ***Id.***

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This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 7th Cir. Rule 32.1.
United States Court of Appeals, Seventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,

v.

Andrew JOHNSTON, Defendant-Appellant.

No. 19-1624

Submitted May 11, 2020*

Decided May 11, 2020

Rehearing and Rehearing En Banc Denied July 13, 2020

Synopsis

Background: After the United States District Court for the Northern District of Illinois, Rebecca R. Pallmeyer, Chief Judge, 2018 WL 8786164, 2018 WL 8786167, 2018 WL 8786165, denied various pretrial motions filed by defendant, including motions to dismiss the indictment and exclude certain evidence, defendant was convicted in the District Court of attempted bank robbery and was sentenced as a career offender to 168 months in prison. After denial of his posttrial motions, defendant appealed.

Holdings: The Court of Appeals held that:

district court had jurisdiction over defendant's prosecution;

indictment adequately put defendant on notice of the charged offense;

police officers who stopped defendant's vehicle had probable cause to arrest him and search the vehicle;

show-up procedure during which bank teller and her supervisor identified defendant was not unduly suggestive;

sufficient evidence supported conviction; and

conviction was a "crime of violence" within meaning of the Sentencing Guidelines.

Affirmed.

***144** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:17-cr-00517-1, Rebecca R. Pallmeyer, *Chief Judge*.

Attorneys and Law Firms

Georgia N. Alexakis, Attorney, Office of the United States Attorney, Chicago, IL, for Plaintiff - Appellee

Andrew J. Johnston, Pro Se

Before DIANE P. WOOD, Chief Judge, MICHAEL B. BRENNAN, Circuit Judge, MICHAEL Y. SCUDDER, Circuit Judge

ORDER

Andrew Johnston has been convicted of and sentenced for attempted bank robbery. See 18 U.S.C. § 2113(a). He now argues that, before trial, the district court should have dismissed his indictment, during trial it should have excluded evidence and instructed the jury differently, and after trial it should have entered a judgment of acquittal or sentenced him differently. His arguments are without merit, so we affirm.

In July 2017, a white male wearing gloves, a mask, and a black hat with the word "Security" on it approached a teller at a Byline Bank branch in Harwood Heights, Illinois, and ordered: "Put your hands up. This is a robbery." The teller was shocked and feared for her life. A branch supervisor and a customer at the drive-by window saw the exchange. The supervisor heard the robber say that his family had been kidnapped and that he had debts; the customer waved his phone and mouthed that he was going to call 911. The robber saw the teller nod to the customer and fled.

Based on help from the customer, who called 911 and pursued the robber, the police soon caught him. The customer saw him drive off in a green car and described the car's make, model, and license plate, as well as the robber's clothes, to emergency dispatch. A police officer heard about the attempted robbery

from dispatch, including the descriptions of the suspect and his car. Approximately two miles from the bank, the officer saw a green car matching dispatch's description, pulled it over, and ordered the driver out. Andrew Johnston stepped out, and other officers soon arrived on the scene. When they peeked through the car's windows, they saw a black "Security" cap in plain view, as well as the gloves and mask described by dispatch. About 20 minutes after the attempted robbery, they brought Johnston to the bank for a show-up. The teller and her supervisor each viewed Johnston (without any mask or hat) separately through a window and identified him as the robber based on his eyes and voice. A grand jury later indicted him for attempted robbery under 18 U.S.C. § 2113(a), which punishes anyone who "by force and violence, or by intimidation ... attempts to" rob a bank.

Representing himself with the assistance of standby counsel, Johnston filed several ***145** unsuccessful pretrial motions. He moved to dismiss the indictment because the court lacked jurisdiction (on the theory that Byline Bank was not federally insured); because the indictment failed to allege "intimidation" adequately; and because the government was withholding material evidence that he had sought through discovery. The court denied the motions. It accepted the government's answer that it had no items responsive to Johnston's discovery requests, ruled that the indictment adequately put Johnston on notice of the crime, and reserved the jurisdictional issue for trial. (Later at trial, the government presented witness testimony and insurance documents showing that Byline Bank was federally insured by the Federal Deposit Insurance Corporation.)

After several continuances to allow him to complete his factual investigation and to serve subpoenas for documents and witnesses, Johnston went to trial. He moved to suppress evidence recovered from his car and the bank tellers' identification of him at the show-up. When the district court ruled that this evidence was admissible, Johnston asked the district court to recuse itself as biased. The court refused, explaining that adverse rulings were not grounds for recusal. Johnston then tried to mount an alibi defense and argue that the government arrested the wrong person for the attempted robbery. For this defense, he wanted to call witnesses. The court explained that Johnston had to bring his witnesses to court. It advised him to use standby counsel to help coordinate the witnesses, and it promised to compel their attendance if he brought motions to enforce his subpoenas. But Johnston never followed through. Later, after closing arguments, he unsuccessfully moved for a judgment of acquittal. The court instructed the jury that the government had to prove beyond a reasonable doubt that, by using "intimidation," Johnston attempted to take money from Byline Bank. The court defined intimidation as doing "something that would make a reasonable person feel threatened under the circumstances." The jury returned a guilty verdict, and the court denied Johnston's later posttrial motions to alter the judgment.

Sentencing followed. Johnston was designated a career offender based on his current conviction and two prior convictions for bank robbery. He unsuccessfully objected on the ground that he had not used violent force in the attempted robbery. Applying the designation, the court sentenced him to 168 months in prison.

On appeal Johnston renews his pretrial arguments, contentions from trial, and post-trial challenges. We begin with his pretrial arguments that the district court should have dismissed his indictment. First, he argues that the FDIC does not insure against bank robbery and is not involved in robbery prosecutions, so it does not supply a basis for jurisdiction. But FDIC-insured banks are instrumentalities of interstate commerce, the robbery of which Congress may criminalize under the Commerce Clause. See *United States v. Watts,* 256 F.3d 630, 633–34 (7th Cir. 2001). And district courts have jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. To the extent that Johnston faults the court for allowing the case to proceed to trial without advance proof of Byline Bank's FDIC-insured status, the district court correctly ruled that the government could provide evidence of the bank's insured status at trial, which it did. See*, e.g.*, *United States v. Hagler,* 700 F.3d 1091, 1100 (7th Cir. 2012).

Second, Johnston argues that the court should have dismissed the indictment for failing to allege adequately that he attempted to rob a bank by intimidation. ***146** But the indictment tracked the language of the statute and provided the date, time, and address of the incident. It therefore adequately put him on notice of the charged offense. See *United States v. Blanchard,* 542 F.3d 1133, 1140 (7th Cir. 2008).

Third, Johnston appears to argue that the district court should have dismissed the case because the government withheld material evidence. Prosecutors must disclose to a defendant favorable, material evidence that they possess. See*, e.g.,* *Kyles v. Whitley,* 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). But the government told the court that

it had no material evidence responsive to his requests, and Johnston provides us with no compelling reason to question that assertion.

We now turn to the challenges that Johnston renews from the trial. First, he contests the admission of the evidence recovered from his car, maintaining that his stop, arrest, and car search were unconstitutional. But the district court properly ruled that the customer's contemporaneous description of the robber's vehicle to 911, which matched the make, color, and license plate of Johnston's car, supplied probable cause for an arrest for attempted robbery. See *Maniscalco v. Simon,* 712 F.3d 1139, 1144 (7th Cir. 2013) (finding probable cause to arrest a suspect for an offense that "just" occurred where the suspect's license plate matched the victim's report). And even if the customer's tip was sufficient to justify only an investigatory stop, officers saw in plain view, and therefore could lawfully seize, the gloves, mask, and "Security" cap matching the dispatcher's report. See *United States v. Cherry,* 920 F.3d 1126, 1137–38 (7th Cir. 2019).

Johnston also argues that the district court should have suppressed the eyewitness identifications because the show-up procedure, which involved a heavy police presence, was unduly suggestive. But show-up identifications are not necessarily invalid if police use them to confirm the identity of suspects apprehended close in time and place to the crime. See *United States v. Hawkins,* 499 F.3d 703, 707 (7th Cir. 2007). Johnston's show-up occurred just twenty minutes after the robbery, so the memories of the two eyewitnesses, who had just observed the crime, were fresh and enabled them to identify him on the basis of his voice and his eyes. Further, law enforcement minimized the suggestiveness of the procedure by separating the witnesses and presenting Johnston without his mask and hat. See *id.* at 708. Thus, suppression was not required.

Next, Johnston complains that the court interfered with his right to compulsory process, thwarting his alibi defense. But the record does not bear out his assertion. During the trial, the court explained that Johnston was responsible for bringing his witnesses to court, it advised him how to do so, and it promised to compel their appearance if he brought a motion to enforce his trial subpoenas, which he did not do. The court thus did not prevent him from presenting a complete defense. See *United States v. Parker,* 716 F.3d 999, 1010–11 (7th Cir. 2013).

Finally, Johnston raises challenges to the jury instructions. He argues that the district court failed to instruct the jury that to convict it had to find that he used "force and violence." But the statute of his offense criminalizes the taking of bank property "by force and violence, *or* by intimidation." 18 U.S.C. § 2113(a) (emphasis added). The district court therefore correctly stated the law, and because Johnston was charged only with attempted robbery by intimidation, it had no obligation to instruct the jury on the "force ***147** and violence" clause. See *United States v. Matthews,* 505 F.3d 698, 704 (7th Cir. 2007). Relying on *United States v. Loniello,* 610 F.3d 488 (7th Cir. 2010), Johnston also insists that he was entitled to an instruction for the "lesser included offense" of the second paragraph of § 2113(a), which criminalizes entering a bank with the intent to commit a felony. But in *Loniello* we held only that the second paragraph of § 2113(a) described an offense distinct from the one in the first paragraph, not a lesser included offense. *Id.* at 492, 496. And both paragraphs carry the same penalty of up to 20 years' imprisonment, so we see no error. See *Prince v. United States,* 352 U.S. 322, 329, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957).

We turn next to Johnston's post-trial challenges. First, he argues that the evidence against him was insufficient to convict. But the jury received evidence that Byline Bank was federally insured, and that a masked Johnston entered and told the teller, "Hands up. This is a robbery." Even though Johnston was unarmed, these words and actions would be sufficient to intimidate a reasonable person to turn over the bank's money. See *United States v. Burnley,* 533 F.3d 901, 903–04 (7th Cir. 2008). Viewing this evidence in the light most favorable to the government, we conclude that a rational jury could use it to find Johnston guilty of attempted bank robbery by intimidation beyond a reasonable doubt. See *United States v. Moore,* 572 F.3d 334, 337 (7th Cir. 2009).

Johnston also challenges his status as a career offender, arguing that his conviction is not a "crime of violence." He appears to rely on *Stokeling v. United States,* —— U.S. ——, 139 S. Ct. 544, 553, 202 L.Ed.2d 512 (2019), to argue that attempted bank robbery by intimidation cannot be a categorical crime of violence because he was convicted without proof that he used, or threatened to use, force capable of causing physical injury. But *Stokeling* merely re-iterated that "physical force" under the guidelines means "force capable of causing physical pain or injury." See *id.* And we have previously held that federal bank robbery by "intimidation" is a categorical crime of violence because a threat of such force is implied in the intimidation element. See

United States v. Williams, 864 F.3d 826, 830 (7th Cir. 2017). *Stokeling* thus does not disturb our precedent that federal bank robbery by intimidation is a "crime of violence" under the guidelines. And because Johnston does not dispute that he has two prior convictions for bank robbery, the district court did not err in designating him a career offender. See U.S.S.G. § 4B1.1(a).

Johnston presents several additional arguments that require little discussion. We mention one briefly—his motion to disqualify the district judge based on adverse rulings. Adverse rulings by a judge neither constitute bias nor demonstrate a need for recusal. See *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). We have considered Johnston's remaining arguments, and none has merit.

AFFIRMED

All Citations

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Footnotes

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. Fed. R. App. P. 34(a)(2)(C).

541 F.3d 8
United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

Angel GARCIA-ALVAREZ,
Defendant, Appellant.

Nos. 07-1471, 07-1697.
|
Heard March 7, 2008.
|
Decided Sept. 4, 2008.

Synopsis

Background: Defendant was convicted, after jury trial, of carjacking and firearms offenses and was sentenced to 181 months in prison by the United States District Court for the District of Puerto Rico, José Antonio Fusté, J., 2007 WL 996162, which had denied defendant's motion to suppress evidence, motion for acquittal, and post-verdict motion for new trial. Defendant appealed.

Holdings: The Court of Appeals, Torruella, Circuit Judge, held that:

lineup identification was not impermissibly suggestive due to defendant's family connection to two other wanted men;

lineup identification was not impermissibly suggestive due to removal of defendant's eyeglasses;

lineup identification based on defendant's Dominican accent was reliable even though suggestive;

carjacking conviction was supported by sufficient evidence; and

new trial was not warranted based on alibi evidence that was discoverable with due diligence.

Affirmed.

Attorneys and Law Firms

***11** Joannie Plaza-Martínez, Assistant Federal Public Defender, with whom Joseph C. Laws, Jr., Federal Public Defender, and Héctor L. Ramos-Vega, Assistant Federal Public Defender, were on brief for appellant.

Vernon B. Miles, Assistant United States Attorney, with whom Rosa E. Rodríguez-Vélez, United States Attorney, Nelson Pérez-Sosa, Assistant United States Attorney, and Germán A. Rieckehoff, Assistant United States Attorney, were on brief for appellee.

Before LYNCH, Chief Judge, TORRUELLA, Circuit Judge, and KEENAN,[*] District Judge.

Opinion

TORRUELLA, Circuit Judge.

Following a jury trial, Ángel García-Álvarez ("García") was convicted of carjacking and firearms offenses. Thereafter, the district court denied his motion for new trial, finding that the evidence it was premised on was not newly discovered. García now appeals his conviction on sufficiency and evidentiary grounds, and challenges the denial of his motion for a new trial. Following a careful review, we reject all of García's claims and affirm the district court.

I. *Background*

A. Facts

As García challenges the sufficiency of the evidence proffered against him, we recite the facts in the light most favorable to the verdict. *See United States v. Vázquez-Botet,* 532 F.3d 37, 42-43 (1st Cir.2008) (quoting *United States v. Colón-Díaz,* 521 F.3d 29, 32 (1st Cir.2008)). On April 12, 2006, around 9:00 a.m., William Ramírez-Resto, a building janitor, was assaulted by at least three armed individuals in the basement of an apartment building in Condado, Puerto Rico. Ramírez-Resto was questioned about the building and its residents, and he was then bound and gagged. At 10:38 a.m., building resident Federico López-Villafañe ("López") was also assaulted in the building's parking lot by four individuals who struck him in the head with rocks and a pistol butt.[1] Three of the assailants wore masks, but López testified that these fell off during the ensuing struggle. López was eventually subdued ***12** and forced into the basement where he heard

one of the assailants state in Spanish with a Dominican accent: "This motherfucker broke my arm!" Like Ramírez-Resto, López was also bound and gagged. The assailants then emptied his pockets and took possession of his house and car keys. Three of the assailants then left to gain access to López's penthouse apartment. The fourth assailant remained behind in the basement holding a gun to López's head.

In López's apartment, Clemencia Lewis, a maid, saw a man she did not recognize enter the apartment and head towards the home office; she testified that it was approximately 10:30 a.m. Lewis was then confronted by a different man armed with a silver-colored gun who, with the help of a third assailant, pushed her into the laundry room, placed her on the floor, and bound her with an iron cord; her face was covered with a towel. The assailants then proceeded to rob the home. They remained in the apartment until approximately 11:20 a.m., when the assailant in the basement became anxious and stepped out to place a call to the men upstairs. López took this opportunity to escape by running into the street. Once there he saw his car-a Mercedes Benz-being driven out of the building's parking lot, apparently by the assailants.

B. Procedural History

Based on López's identification of him at a police lineup, García was indicted on one count of carjacking resulting in serious bodily injury under 18 U.S.C. § 2119(2), and one count of possession of a firearm in relation to a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). He was arraigned one week later, and his trial date was set for August 14, 2006. Shortly before trial, Lewis also identified García from a police photo spread. On August 13, 2006, García moved to have both López's and Lewis's identifications suppressed, but the district court denied this motion during the course of the four-day trial.

At trial, García maintained his innocence and presented an alibi defense. The jury nonetheless found him guilty of the firearms offense and the lesser included offense of simple carjacking. *See* 18 U.S.C. § 2119(1). García moved for a judgment of acquittal but was denied this on September 12, 2006. On February 13, 2007, the day of his sentencing hearing, García filed a motion for new trial based on newly discovered evidence. The district court sentenced García to a total of 181 months' imprisonment along with a period of supervised release. García timely appealed arguing that the district court erred in admitting López's and Lewis's out-of-court and in-court identifications, and in failing to grant judgment of acquittal based on the Government's failure to sufficiently prove the carjacking charge.

On March 30, 2007, the district court also denied García's motion for new trial because the evidence it was premised on was not unknown or unavailable at the time of the trial and could have been discovered with due diligence. García also appeals this denial, and his three claims have been consolidated in this appeal.

II. *Discussion*

A. Suppression Challenge

We review a district court's denial of a suppression motion with deference; such denial will be upheld if any reasonable view of the evidence supports it. *See United States v. Brown,* 510 F.3d 57, 64 (1st Cir.2007) (quoting *United States v. St. Pierre,* 488 F.3d 76, 79 (1st Cir.2007)). Where, as here, the district court failed to make any specific findings regarding the motion to suppress, we view the record in the light most favorable to the district ***13** court's holding and draw all reasonably supported inferences in its favor. *United States v. McCarthy,* 77 F.3d 522, 525 (1st Cir.1996) (citations omitted).

An eyewitness identification, such as those of López and Lewis, will be suppressed only upon a double showing: first, that the identification was secured through impermissibly suggestive means; and second, that under the totality of the circumstances the suggestiveness of the identification is such that the identification itself is not reliable. *United States v. de Jesús-Ríos,* 990 F.2d 672, 677 (1st Cir.1993). Suppression of an identification is only appropriate if we are convinced that there is a "very substantial likelihood of irreparable misidentification." *United States v. Pérez-González,* 445 F.3d 39, 48 (1st Cir.2006). García asserts that López's and Lewis's identifications were secured through impermissibly suggestive means and are unreliable to the extent of meeting the *de Jesús-Ríos* standard.

Immediately following the robbery and carjacking, López provided the police with a description of the four assailants' clothing. He also noted that the assailants spoke Spanish with a Dominican accent. Six weeks after the incident, García voluntarily attended a police lineup where he appeared with five other men. All six men were dressed in orange jumpsuits, and García was made to remove his eyeglasses. When the men were first presented to López, he identified García and stated that he was ninety percent certain that García was one of the

assailants who had assaulted and robbed him. Upon request, the six men then repeated in Spanish the statement made by one of the assailants during the robbery: "This motherfucker broke my arm!" Upon hearing this phrase, López identified García with complete certainty.

García argues that López's lineup identification of him was impermissibly suggestive for three reasons: first, because García alleges that he only became a suspect due to his family connection to two other men suspected in the crime; second, because he was made to remove his eyeglasses even though-as his optometrist later certified-he is legally blind without them; and third, because he was made to repeat the assailant's statement even though he was the only man on the panel who spoke Spanish with a Dominican accent.

García's first claim is quickly dismissed. García's initial identification as a suspect, even if it resulted from his family connection to two other wanted men, is not an impermissibly suggestive procedure affecting López's lineup identification. López was unaware of the circumstances under which García became a suspect. As López was not privy to this information, there is no way such knowledge could have influenced or colored his identification of García.

The removal of García's eyeglasses was similarly not suggestive. García's second claim here is peculiar in that most identification challenges we and our sister circuits encounter involve the presence of a distinguishing characteristic that stands out during the identification process. *See, e.g., Monteiro v. Picard,* 443 F.2d 311, 312 (1st Cir.1971) (appellant challenged the suggestiveness of his lineup identification where he was the only man wearing civilian clothing while the rest of the panel wore prison garb); *United States v. Traeger,* 289 F.3d 461, 474 (7th Cir.2002) (appellant challenged the suggestiveness of his lineup identification because-at six and a half feet and weighing over 300 pounds-he was the largest man on the panel); *United States v. Triplett,* 104 F.3d 1074, 1080 n. 2 (8th Cir.1997) (appellant ***14** challenged the suggestiveness of the lineup identification during which he wore a brightly colored but "surprisingly tasteful, Hawaiian-type shirt"). In these cases, appellants usually argue that they have been wronged because the composition of their lineup was in some way not uniform. García's claim, then, is the converse in that, if he had been allowed to wear his eyeglasses when the rest of his panel did not wear any, he would have stood out. The removal of García's eyeglasses as well as the use of the orange jumpsuits were intended to preserve the integrity of the police lineup and advance the goal of uniformity. As such, the removal of the eyeglasses was not an impermissibly suggestive procedure.[2]

García's third challenge, however, requires a closer look. As a starting point, making the lineup panel repeat the assailant's statement was not an impermissibly suggestive identification procedure. *See United States v. Panico,* 435 F.3d 47, 49 (1st Cir.2006) ("Lay witness identification, based on the witness' prior familiarity with a voice, is a commonplace way in which voices are identified."); Fed.R.Evid. 901(b)(5); 5 Christopher B. Mueller & Laird C. Kirkpatrick *Federal Evidence* § 9:13 (3d ed.2008). The allegation that García was the only man on the panel who spoke Spanish with a Dominican accent, however, is troubling because the Dominican accent then became a distinguishing characteristic that detracted from panel uniformity. Furthermore, since López's description of the assailants to the police highlighted their Dominican accents, that García was the only panel participant who possessed this salient characteristic turned the entire identification proceeding unduly suggestive. *Cf. Frazier v. New York,* 156 Fed.Appx. 423, 425 (2d Cir.2005) (finding suggestive a lineup identification where appellant was the only person with dreadlocks, where dreadlocks were the most distinctive feature of the crime victim's description of her assailant).

A suggestive identification may nonetheless remain in evidence if, given the totality of the evidence, it is reliable. *de Jesús-Ríos,* 990 F.2d at 677. In determining whether there was a substantial likelihood of irreparable misidentification we evaluate some or all of five factors: (1) the witness's opportunity to view the criminal at the time of the crime, (2) the witness's degree of attention at that time, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the victim at the time of the identification, and (5) the length of time between the crime and the identification. *Id.* (quoting *United States v. Drougas,* 748 F.2d 8, 27 (1st Cir.1984)); *accord Neil v. Biggers,* 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

Of these five factors, two clearly support reliability in this case. Given the traumatic nature of the robbery and carjacking, we assume López's degree of attention during the incident to have been high. *See Levasseur v. Pepe,* 70 F.3d 187, 195 (1st Cir.1995). In addition, López himself stated that he was ninety, and later, one hundred percent certain of his identification of García at the time of the police lineup. The remaining three factors, however, are either neutral or weigh against reliability. López's opportunity to view his

assailants during the criminal incident, though ample due to the hours-long duration of the crime, was hampered by the assailants' intermittent use of masks and blindfolds. ***15** López's initial description of the assailants did not include any identifying physical characteristics, and six weeks elapsed between the robbery and carjacking and the police lineup. *See United States v. Guzmán-Rivera,* 990 F.2d 681, 683 (1st Cir.1993) (counting as factors detracting from the reliability of an identification the fact that the crime victim had not provided the authorities with a description of the assailant and had made his final identification one month after the crime); *but see United States v. Mohammed,* 27 F.3d 815, 822 (2d Cir.1994) ("[T]he absence of a prior description by the witness does not necessarily render his or her subsequent identification suspect." (internal quotation marks omitted)).

Nonetheless, given the totality of the circumstances, we cannot say that the fact that García was the only one in the lineup who spoke with a Dominican accent produced a "very substantial likelihood of irreparable misidentification." *Pérez-González,* 445 F.3d at 48. We are not required to accord each factor equal weight or even to consider all five factors. *See, e.g., United States v. Gatewood,* 230 F.3d 186, 193 (6th Cir.2000) (considering only two factors); *United States v. Johnson,* 56 F.3d 947, 954 (8th Cir.1995) (considering only three factors); *United States v. Butler,* 970 F.2d 1017, 1021 (2d Cir.1992) (considering only four factors). In this case, the fact that López was able to identify García with a very high degree of certainty before García was even asked to speak at the lineup weighs heavily in favor of reliability. *Cf. United States v. Wilkerson,* 84 F.3d 692, 695-96 (4th Cir.1996) (placing particular emphasis on the certainty with which multiple witnesses identified the defendant). As such, the district court did not err in admitting López's out-of-court identification into evidence.[3]

García's challenge to Lewis's out-of-court and in-court identifications is far less developed. One week before García's trial was to begin, an FBI agent visited Lewis at her place of work and showed her a photo spread containing six pictures, one of which was of García. Lewis initially picked a different man from the photo spread, but indicated that she was uncertain. Lewis then stated that the man who had assaulted her was tall and had a dark complexion and a very pointy chin. She subsequently picked García's photograph. García does not flag any of the procedures utilized during this identification as impermissibly suggestive; and therefore his claim fails. *See de Jesús-Ríos,* 990 F.2d at 677.[4] The district court properly denied García's motion to suppress.

B. Sufficiency Challenge

We review a sufficiency of the evidence claim *de novo,* "evaluating whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Meléndez-Torres,* 420 F.3d 45, 48-49 (1st Cir.2005) (quoting *United States v. Grace,* 367 F.3d 29, 34 (1st Cir.2004)). We also review *de novo* a district court's denial of a motion for acquittal, "examining the evidence ... in the light most favorable to the government to determine whether a ***16** reasonable jury could find guilt beyond a reasonable doubt." *United States v. Rodríguez-Durán,* 507 F.3d 749, 758 (1st Cir.2007).

It is the Government's duty to prove all the elements of a charged crime. For carjacking under 18 U.S.C. § 2119(1) those elements are: (1) taking or attempted taking from the person or presence of another; (2) a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce; (3) through the use of force, violence, or intimidation; (4) with the intent to cause death or serious bodily harm. *See* 18 U.S.C. § 2119(1). García argues that the Government has not met its burden of establishing the intent element beyond a reasonable doubt because López's assailants did not intend to take his car but only to rob his home. The car was only an improvised getaway vehicle.

García's argument is unavailing. In carjacking offenses, the element of intent must be established at the time the defendant takes control of the motor vehicle. *United States v. Evans-García,* 322 F.3d 110, 114 (1st Cir.2003) (quoting *Holloway v. United States,* 526 U.S. 1, 8, 119 S.Ct. 966, 143 L.Ed.2d 1 (1999)). At the time of such taking, the victim need not be in close proximity to the motor vehicle. *See United States v. Vega Molina,* 407 F.3d 511, 528 (1st Cir.2005). In García's case, the "taking" of the motor vehicle occurred in the apartment building's basement, when López was forced to turn over his car keys. It was at that point that the assailants gained constructive control over López's car. *See id.*; *accord United States v. Savarese,* 385 F.3d 15, 20 (1st Cir.2004).

The intent required at the time of the vehicle taking, however, need not be set in stone. It will suffice that a defendant had a conditional intent to cause death or serious bodily harm; that is, a willingness to cause such injury if necessary to take the vehicle. *Evans-García,* 322 F.3d at 114 (citing *Holloway,* 526 U.S. at 11-12, 119 S.Ct. 966). Such conditional intent is more than amply established in this case by the fact

that the assailants did, from their initial contact with López, use force and inflict serious physical harm upon him. Such force involved the use of guns, and it was only upon being threatened with further violence and even death that López surrendered his car keys. As the assailants' violent assault left López bleeding and requiring medical care and even surgery, it is beyond question that the assailants possessed the requisite intent to cause death or serious bodily harm.

Finally, and in direct response to García's "getaway vehicle" argument, we have previously said that "nothing in the statute requires that the taking [of a motor vehicle] be an ultimate motive of the crime." *United States v. Rivera-Figueroa,* 149 F.3d 1, 4 (1st Cir.1998). "It is enough that the defendant be aware that the action in which he is engaged ... involves the taking of a motor vehicle." *Id.* In this case, the Government presented evidence that García was both present and active in López's assault, and that he later rode away from the robbery scene in López's Mercedes, which was started with the car keys López was forced to surrender. Based on this evidence, García could not but be aware that he was involved in the taking of a motor vehicle, and the intent requirement of the carjacking offense is resoundingly met. The Government has thus satisfied its burden of proving each element of the carjacking offense beyond a reasonable doubt. The district court correctly denied García's motion for judgment of acquittal.

C. Motion for New Trial

The remedy of a new trial is to be granted sparingly and only to avoid a ***17** miscarriage of justice. *United States v. Conley,* 249 F.3d 38, 45 (1st Cir.2001). We recognize that trial judges are in the best position to determine whether a new trial based on newly discovered evidence is warranted, and we thus review any such determination only for abuse of discretion. *See United States v. Montilla-Rivera,* 171 F.3d 37, 40 (1st Cir.1999) (quoting *United States v. Tibolt,* 72 F.3d 965, 972 (1st Cir.1995)). Nevertheless, the district court's analysis and our review are also guided by the principle that a new trial should be granted "if the interest of justice so requires." Fed.R.Crim.P. 33(a); *see also United States v. Rodríguez-Marrero,* 390 F.3d 1, 13-14 (1st Cir.2004).

In order to reverse a district court's denial of a motion for new trial based on newly discovered evidence, the defendant carries the heavy burden of showing that the new evidence submitted was: (1) unknown or unavailable at the time of trial; (2) despite due diligence; (3) material; (4) and likely to result in an acquittal upon retrial. *United States v. Falú-González,* 205 F.3d 436, 442 (1st Cir.2000) (quoting *United States v. Montilla-Rivera,* 115 F.3d 1060, 1064-65 (1st Cir.1997)). García asserts that the evidence grounding his motion for new trial meets this high standard. Such evidence consists of a report and hearing testimony from Centennial cell phone company engineers stating that all cell phone calls made from García's phone on the morning of the crime were placed from the municipality of Carolina and not from the crime scene in Condado ("cell site evidence").[5] García submits this evidence as probative of the alibi defense he presented at trial.[6]

According to the Centennial engineers, the cell site evidence demonstrates that, on the morning of the robbery and carjacking, all calls made by García's cell phone were handled by cell sites within the municipality of Carolina and along the purported delivery route. Based on this finding, the engineers assert that it is almost certain that García's calls were placed from Carolina. This is because cell phone calls are usually handled by the cell site closest to where the cell phone is located; only rarely are phone calls referred to a cell site that is farther away.[7]

On appeal, the Government does not dispute the engineers' testimony, but argues that the cell site evidence does not entitle García to a new trial because it is not newly discovered as required by ***18** Federal Rule of Criminal Procedure 33. Moreover, even if the evidence is accepted as true, it only shows that García's *cell phone* was in Carolina, not that García himself was there. With these arguments in mind, we proceed to our analysis.

Falú-González asks whether the new evidence "could have been discovered with due diligence and was thus not 'new' " at the time of trial. *Id.* at 443. It is undisputed that defense counsel was in possession of García's cell phone records before the start of trial. On those records, each phone call has a billing code (*e.g.,* "9E," "VP," "P2") listed to its right and a legend at the bottom of the page that matched each code to a general geographic area (*e.g.,* "9E-San Fernando," "VP-Villa Palmeras," "P2-Puerto Nuevo"). The call records did not indicate the significance of these billing codes nor did they suggest that Centennial had the capability to further delineate the geographical provenance of each call to almost street level. Both parties accept that defense counsel did not learn of the possibility of such specific call triangulation until after the jury's verdict, and that Centennial only generated the cell site evidence upon the defense's post-judgement request.

Nonetheless, the trial judge did not abuse his discretion in finding that this evidence could have been discovered with due diligence and was thus not new. We understand due diligence to be "a context-specific concept" generally akin to the degree of diligence a reasonably prudent person would exercise in tending to important affairs. *United States v. Maldonado-Rivera,* 489 F.3d 60, 69 (1st Cir.2007). As stated above, García's counsel did not know-and did not endeavor to learn prior to trial-that through cell site location Centennial would be able to pinpoint the provenance of the calls made from García's and Espaillat's cell phones to nearly street level. Defense counsel also admit that they were so certain of García's innocence that they made the tactical decision to rely solely on the strength of their other alibi evidence.

García's counsel made a conscious decision to go to trial using the evidence they had available. Counsel's work log further indicates that counsel did not inquire about the billing codes on García's call records until more than two months after the jury had entered its guilty verdict. That being the case, even if it is true that the development and production of the cell site evidence was so complex and time-consuming that it took two and a half months to complete-and hence could not have been achieved in the three weeks between the district court's initial status conference and the beginning of García's trial-García cannot now establish his counsel's due diligence. Defense counsel did not do anything before or during trial to secure the post-judgment evidence upon which García's motion for new trial is premised. Rule 33 does not give counsel a second opportunity to rectify a faulty trial strategy. As such, García's motion for new trial was properly denied.

García may choose to raise by collateral attack under 28 U.S.C. § 2255 the issue of whether his counsel's performance amounted to ineffective assistance of counsel. *See Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If so, it is likely that evidence will have to be taken on a number of points, which are beyond the scope of this opinion.

III. *Conclusion*

For the foregoing reasons, we affirm the district court's judgment and denial of new trial.

Affirmed.

All Citations

541 F.3d 8

Footnotes

* Of the Southern District of New York, sitting by designation.

1 We pinpoint this based on a two-minute phone call López received on his cell phone at 10:36 a.m. He was assaulted immediately after hanging up.

2 In as far as García's argument is that, due to his eye condition, he always wears glasses and would thus have worn them during the robbery and carjacking, the jury already considered and rejected this argument. We see no need to upset the jury's determination.

3 We see no evidence that the unduly suggestive procedure in any way tainted the in-court identification or made it unreliable. *See United States v. Maguire,* 918 F.2d 254, 264 (1st Cir.1990) (stating that an in-court identification is generally admissible unless it is based on an out-of-court identification that was both suggestive and unreliable).

4 As the out-of-court photo spread identification was proper, Lewis's in-court identification was proper as well. *See id.*

5 The district court took judicial notice of the fact that the municipalities of San Juan-where Condado is located-and Carolina border each other, and are geographically close.

6 At trial, García argued that at the time of the charged crimes he was working on his side business delivering furniture in the municipality of Carolina. In this endeavor he was accompanied by his employee Juan Espaillat, who submitted an unsworn statement in García's favor. According to both men, on the morning in question they met at about 9:00 a.m. at the American Furniture store in Carolina. García advised Espaillat that he needed to go pay his cell phone bill before making the delivery, and Espaillat loaded the furniture into a white box truck by himself. When he was done, Espaillat

spoke to García on his cell phone and set out to make the furniture delivery at about 10:30 a.m. According to Espaillat, after conversing with García a few more times to get directions, he arrived at the delivery residence at approximately 11:00 a.m. García arrived in his gray Toyota Tundra pickup truck five minutes later. With both men's efforts, the delivery of the furniture was finished around noon.

7 Indeed, to ascertain the rate of call referrals within the Condado area, the engineers carried out an experiment where they placed one hundred cell phone calls during the span of one hour while situated at the scene of the robbery. All one hundred of those calls were handled by the same cell site in Condado, and none was handled by a cell site in Carolina. Thus, according to the engineers, the rate of call referral in Condado is extremely low.

460 F.2d 270
United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,

v.

John HARRISON and William Hutchinson, Defendants-Appellants.

No. 331, Docket 71-1752.

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Argued Dec. 7, 1971.

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Decided April 25, 1972.

Synopsis

Defendants were convicted in the United States District Court for the Eastern District of New York, Leo F. Rayfiel, J., of bank robbery, accompanied by assault with a dangerous weapon, and conspiracy, and they appealed. The Court of Appeals held that even though picture of each defendant was only one in each group shown to witnesses that was a single, front-view photograph and the only one showing a clean shaven visage, totality of identification procedures were not so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification and did not deny defendants due process.

Affirmed.

Attorneys and Law Firms

***270** Maurice Brill, New York City, for appellant Harrison.

Kenneth W. Salaway, Kew Gardens, N. Y. (Kane, Salaway & Finger, Kew Gardens, N. Y., on the brief), for appellant Hutchinson.

Peter R. Schlam, Asst. U. S. Atty., Eastern District of New York (Robert A. Morse, U. S. Atty., and David G. Trager, Asst. U. S. Atty., Eastern District of New York, on the brief), for appellee.

Before ANDERSON, OAKES and TIMBERS, Circuit Judges.

Opinion

PER CURIAM:

John Harrison and William Hutchinson each make a single point in their appeals from judgments of conviction against them for bank robbery, accompanied by assault with a dangerous weapon, and conspiracy, 18 U.S.C. §§ 2113(a), (d), 371, which is that the Government used impermissibly suggestive pre-arrest photographic identification techniques, see Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). After a pre-trial suppression hearing on this issue, the trial court determined that the identification procedure did not deny the defendants due process. We agree.

Joseph Dente, the bank manager, selected Harrison's picture from a group of seven photographs as that of a person similar to the robber who struck him on the head during the robbery; Elaine Fabian, a teller, selected Hutchinson's photograph from another group of seven as the one who had emptied the cash drawer. Dente later picked both Harrison and Hutchinson out of separate live line-ups of six men each and made an incourt identification of the defendants at ***271** the trial. Fabian picked Hutchinson out of his line-up and identified him at trial.

Each appellant challenges the fact that his picture was the only one in each group shown to the witnesses that was a single, front-view photograph, while the others were all double view, *i. e.* full face and profile, "mug shots." This court, however, has recently held that such a difference in photographs is not in itself sufficient to make the identification procedure impermissibly suggestive, United States v. Magnotti, 454 F.2d 1140, 1141 (2 Cir. 1972).

Harrison argues, however, that he was further prejudiced by the fact that his picture was the only one in the group shown to Dente showing a clean shaven visage. While it is true that a line-up of photographs may become impermissibly suggestive when the distinguishing characteristics of the other persons shown, as compared with those of the suspect, are dramatically pronounced so that a witness who had seen the suspect only briefly on one occasion might well be influenced in making an identification by the unnecessarily striking differences which made the photograph of the suspect stand out prominently from the others, this is not such a case. *Cf. Magnotti, supra,* at 1141; United States v. Fernandez, 456 F.2d 638, 641 (2 Cir. 1972). Most of the photographs[1] used in this identification show faces with a very low degree of prominence in their hirsute adornments which did not obscure

their facial contours or features and which would not be likely to distort or mislead in the process of identification. The fact that Hutchinson was shown as clean shaven and the others in his group were not left him in virtually the same position as Harrison, but he at no time raised the point at the trial or on appeal. This reflects how slight an impression these distinguishing facial characteristics must have made.[2]

We hold that there was no error in the ruling of the trial court which was, in effect, that the totality of the identification procedures were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," Simmons, supra, 390 U.S. at 384, 88 S.Ct. at 971.

Affirmed.

All Citations

460 F.2d 270, 31 A.F.T.R.2d 73-967

Footnotes

1 The failure of the Government at oral argument to provide this court with the set of photographs which were shown to Dente has caused a great deal of confusion and has demonstrated a degree of carelessness in the handling of exhibits which is inexcusable. In the future, when the issue of suggestive photographic identification procedures is raised on appeal, the Government should furnish the court at oral argument the set of photographs in question.

2 Because the photographs were not impermissibly suggestive, we need not reach the question of whether or not there was taint which would have invalidated the incourt identification in this case, see United States ex rel. Phipps v. Follette, 428 F.2d 912, 914-915 (2 Cir.), cert. denied, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970). There is, however, substantial evidence that both witnesses had independent bases for their identifications. Dente testified that he was more sure of his identification of Harrison in person than he was from the photograph, and he picked the suspect out of a lineup, even though Harrison then had a beard and a mustache. Fabian had ample opportunity to observe Hutchinson during the robbery, as she stood next to him while he emptied the cash drawers and accompanied him to the vault.

990 F.Supp. 141
United States District Court,
E.D. New York.

UNITED STATES of America,
v.
Samuel MATOS, Defendant.

No. 97 CR 803(JG).
|
Jan. 7, 1998.

Synopsis
Defendant was charged with bank robberies and carrying firearm during robbery, and moved to suppress handwriting exemplars given by him, claiming violation of Fifth Amendment right against self-incrimination. The District Court, Gleeson, J., held that: (1) provision of exemplars by dictation was testimonial in nature where one incriminating aspect was content of writing, specifically defendant's spelling of a certain word, but (2) defendant was foreclosed from invoking Fifth Amendment protection as he did not claim that privilege at time exemplars were given.

Motion to suppress denied.

Attorneys and Law Firms

***142** Leonard F. Joy, The Legal Aid Society, Federal Defender Div., Brooklyn, NY by Cynthia A. Matthews, JaneAnne Murray, for Defendant.

Zachary Carter, U.S. Atty., E.D. New York, Brooklyn, NY by Jill Feeney, Asst. U.S. Atty., for U.S.

MEMORANDUM AND ORDER

GLEESON, District Judge.

Samuel Matos, Jr., is charged in a four-count indictment with two counts of bank robbery (arising out of robberies committed on August 28, 1992, and September 18, 1992), and with carrying a firearm during each robbery. The defendant has moved to suppress certain handwriting exemplars taken from him on the ground that the circumstances in which they were given amounted to a violation of his Fifth Amendment right against self-incrimination. For the reasons set forth below, the motion is denied.

FACTS

A. *The Charged Robberies*
On August 28, 1992, a man with a gun robbed the National Westminster Bank at 6901 Fifth Avenue in Brooklyn. The robber handed the teller a note and a gray plastic bag. The note was returned to the robber in the bag along with some money.

On September 18, 1992, a gun-toting robber handed a note and a bag to a teller at the Hamilton Federal Savings Bank at 240 Court Street in Brooklyn. The note from that robbery will be an exhibit at trial. It directed the teller to, *inter alia,* "Put all your (from *both draws* (sic)) $500.00, $100.00, $50.00, $20.00 Etc. in the bag" (emphasis in original).

B. *The Uncharged Attempted Robbery*
The government intends to offer, pursuant to Fed.R.Evid. 404(b), an attempted robbery of a Chemical Bank branch at 280 Graham Avenue (presumably in Brooklyn) on September 4, 1992. The would-be robber used a note, which the government intends to offer at trial. The note from this robbery is strikingly similar, in content and appearance, to the above-quoted note used two weeks later by the robber of the Hamilton Federal Savings Bank. However, the word "drawers" does not appear in any form on the note used at Chemical Bank.

C. *The Investigation*
On November 12, 1996, a grand jury subpoena was issued commanding Matos to provide, among other things, handwriting exemplars to the grand jury on November 29, 1997. However, the subpoena stated that compliance could be accomplished by providing the exemplars to Pamela Lane, an agent of the Federal Bureau of Investigations ("FBI"), at her office. Agent Lane's office address and telephone number were set forth on the subpoena. After receiving the subpoena, Matos telephoned Agent Lane and arranged to provide an exemplar at her office on December 3, 1996. Matos arrived at the FBI office on that date by himself.

Matos was advised by Agent Lane and Agent Lynn Willet that they were investigating three bank robberies. They instructed him not to talk about the bank robberies, and told him that if he wanted to do so, he should have an attorney present. The

defendant never requested counsel or stated that he wanted to leave. No guns or handcuffs were displayed or used.

***143** The agents proceeded to take the exemplars from Matos. For some of the exemplars, he was given documents to copy. For example, he was given a newspaper article, which he was told to read and then copy. For other exemplars, however, he was directed to write down words that were read to him by the agents. The words that were read to him included words from the two notes that the government plans to introduce as evidence at trial. Matos was also asked to write a series of monetary amounts.

According to an affidavit provided by Agent Lane, the agents gave specific directions to Matos as to how certain dictated terms should be written. They instructed him (1) how to write the numbers, *e.g.,* he was not instructed to write "one hundred dollars;" rather, he was instructed to write "dollar sign, one, zero, zero, decimal point, zero, zero;" (2) to write the word "til"(rather than "until"); and (3) to underline certain terms that were underlined in the bank robbery notes. However, the defendant was not instructed as to how to spell the word "drawers."

The handwriting exemplars provided by the defendant and the bank robber's note from the September 18 robbery contain the same misspelling of the word "drawers;" in both, the word is spelled "draws."

D. *The Arrest, Indictment and Motion To Suppress*

Matos was arrested on a warrant on July 30, 1997. He was indicted on August 28, 1997. On November 26, 1997, he moved to suppress the handwriting exemplars on the ground that, by dictating what was to be written, the agents violated his Fifth Amendment right against self-incrimination. Trial is scheduled to begin on January 12, 1998.

In opposition to the motion, the government argued only that there was nothing testimonial about the provision of the exemplars, and thus the Fifth Amendment was not implicated. At oral argument on December 19, 1997, I requested additional briefing on the question whether the defendant's failure to assert the Fifth Amendment privilege at the time the exemplars were provided precluded its assertion now. Letter briefs on that issue have since been filed.

I agree with the defendant that he provided testimonial communication in addition to handwriting samples when the exemplars were taken. However, because he failed to assert his Fifth Amendment privilege at that time, his motion to suppress the exemplars is denied.[1]

DISCUSSION

A. *The Defendant's Spelling Of Words In The Exemplars Constituted Testimony*

In support of his claim that the handwriting exemplars were taken in violation of his Fifth Amendment right against self-incrimination, the defendant distinguishes samples produced by dictation from those produced by copying written material. The defendant acknowledges that the compulsion of handwriting samples has generally been held not to violate the Fifth Amendment, but correctly asserts that this is true only where no claim is made that the provision of the exemplars is testimonial or communicative in nature. *See Gilbert v. California,* 388 U.S. 263, 267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

The defendant relies primarily on two cases. In *United States v.. Wade,* 1995 WL 464908 (S.D.N.Y. Aug.4, 1995), the court denied the government's motion to compel the defendant to provide handwriting samples of ***144** dictated material. It found that such samples would reveal not only the defendant's penmanship, but also his spelling abilities and the form in which he wrote numbers on checks. The court reasoned that while handwriting generally is "regarded as a means of communication that lacks communicative intent," the compulsion of samples by dictation requires a defendant to demonstrate his "his thought processes, which have communicative qualities," and is therefore prohibited by the Fifth Amendment. *Id.* at *2.

Similarly, in *United States v. Campbell,* 732 F.2d 1017 (1st Cir.1984), the First Circuit found prejudicial error where the government was permitted at trial to point out that the defendant had defied a court order to give such handwriting samples. The court focused on the testimonial nature of the defendant's spelling abilities, explaining that "when he writes a dictated word, the writer is saying 'This is how I spell it,'a testimonial message in addition to a physical display." *Id.* at 1021.

For its part, the government relies on the Ninth Circuit's rejection of the argument that handwriting exemplars from dictation constitute a communication, the compulsion of which is prohibited by the Fifth Amendment. *United States v. Pheaster,* 544 F.2d 353 (9th Cir.1977), *cert. denied,* 429 U.S.

1099, 97 S.Ct. 1118, 51 L.Ed.2d 546 (1977). Rather, the court found that

> like spelling, penmanship is acquired by learning. The manner of spelling a word is no less an 'identifying characteristic' than the manner of crossing a 't' or looping an 'o'. All may tend to identify a defendant as the author of the writing without involving the content or message of what was written.

Id. at 372.

I agree with *Wade* and *Campbell*. *Pheaster*'s summary dismissal of the defendant's Fifth Amendment claim failed to focus on the obvious testimonial component of such handwriting exemplars. Requiring a person to provide an exemplar from dictation that does not provide the spelling of the dictated words is the functional equivalent of requiring the person to state how he spells the dictated words. The answer may well serve to identify the person as the perpetrator of a crime, but that does not render it an "identifying characteristic" akin to fingerprints or blood type, as the Ninth Circuit found in *Pheaster*. "A mere handwriting exemplar, *in contrast to the content of what is written,* like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment's] protection." *Gilbert,* 388 U.S. at 266–67 (emphasis added). This case places that distinction in clear relief. There is no dispute that a very incriminating aspect of the defendant's exemplars is the content of what he wrote, specifically, his spelling of the word "drawers." This incriminating feature of the exemplars cannot reasonably be said to arise from Matos's "mere handwriting;" indeed, it would be present even if he had typed the words dictated to him by the agents. Spelling is the result of the operation of a person's mind, the expression of which generally falls within the Fifth Amendment's protection. "There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege." *Doe v. United States,* 487 U.S. 201, 213–14, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). The verbal statement here—the defendant's spelling of a particular word—is testimonial. But for the roundabout way in which the defendant was asked to make it, I do not believe the issue would have arisen. If the subpoena had called for the defendant's testimony before the grand jury, and the first question to him had been "How do you spell 'drawers?'," the government would be hard-pressed to argue, in response to an assertion of the privilege with respect to that question, that the answer would not constitute testimony. The provision of that information by writing out dictated words does not render it any less testimonial.

B. *The Defendant Is Foreclosed From Invoking The Privilege*
Under ordinary circumstances, in order for a witness to avail himself of the protection of the Fifth Amendment, "he must claim it or he will not be considered to have been 'compelled' ***145** within the meaning of the Amendment." *United States v. Monia,* 317 U.S. 424, 427, 63 S.Ct. 409, 87 L.Ed. 376 (1943). This principle has been applied in a variety of Supreme Court cases, which, taken together, "stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner v. United States,* 424 U.S. 648, 654, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976). In *Garner,* for example, the defendant was foreclosed from invoking the privilege when his tax returns were offered against him in a criminal prosecution because he had failed to invoke it on the returns, choosing instead to make the incriminating disclosures. *Id.* 424 U.S. at 665.

Thus, the general rule is that the Fifth Amendment privilege is not self-executing; it must be claimed by the witness. The Supreme Court has acknowledged, however, that there are certain "narrowly defined situations" in which incriminating disclosures are considered "compelled" despite a failure to claim the privilege. *Id.* at 656. One of those situations, of course, is a custodial interrogation. *Id.* at 657; *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). However, there is no contention here that Matos was subjected to such an interrogation. Indeed, in a letter submitted yesterday, defense counsel concedes that he was not. Rather, the defendant relies solely on the fact that Matos was subject to subpoena as the basis of his claim that the exemplars were coerced from him in violation of the Fifth Amendment. He contends that the subpoena was a gun to his head, coercing him to provide information, and that the Fifth Amendment required that coercion to be "dissipated by (at the very least) advising him of his right to refuse to answer any questions that may incriminate him." Letter from JaneAnne Murray dated January 6, 1998, at 2.

The Supreme Court has not squarely resolved the question whether *Miranda*-type warnings must be given to grand jury witnesses who are targets of the investigation. *See United States v. Washington,* 431 U.S. 181, 190, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977)(because modified *Miranda* warnings were given to the grand jury witness, "we do not decide

whether such warnings were constitutionally required"). However, the Court has held that a probationer's obligation to appear and answer his probation officer's questions did not in itself convert his admissions to the officer into compelled incriminations. *Minnesota v. Murphy,* 465 U.S. 420, 426, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984). The court's reasoning and language in that case seem incompatible with Matos's argument:

> We note first that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege.

Id. I agree with two prominent commentators' assertion that, if the Supreme Court addresses the issue head-on, it will hold that the Constitution does not require the administration of warnings to testifying targets in the grand jury, *see* Sara S. Beale and William C. Bryson, *Grand Jury Law And Practice* § 6:15 at 83–84 (1995), even though warnings might serve to dissipate a grand jury witness' misimpression that he must answer incriminating questions truthfully. *Minnesota v. Murphy,* 465 U.S. at 431.

Of course, Matos did not appear in the grand jury. Pursuant to a common practice, the prosecutor noted on the subpoena that Matos could comply by providing the exemplars to Agent Lane at her office. Although this practice is not beyond controversy, it makes sense to permit it. The provision of exemplars is often a time-consuming task, and the utility of the exemplars themselves generally requires meticulous comparison of ***146** the exemplars with other, questioned documents. It scarcely makes sense to require the arduous task of providing exemplars to occur in the grand jury room if the person under subpoena does not insist on it. *See United States v. Smith,* 687 F.2d 147, 152 (6th Cir.1982), *cert. denied,* 459 U.S. 1116, 103 S.Ct. 752, 74 L.Ed.2d 970 (1983). In any event, the defendant makes no challenge to the use of the subpoena to obtain the exemplars at the FBI offices.

Arguably, however, the fact that Matos did not appear in the grand jury room strengthens his claim that *Miranda*-type warnings were required. The argument goes as follows: the grand jury room is not a police station, where inherently coercive questioning can occur in the presence of only the police. To the contrary, it is a quintessentially public setting, as interrogations go, subject to the supervision of the district court, and thus is far less conducive to the kinds of coercive tactics that can occur in custodial interrogations. *See* Beale & Bryson, § 6:15 at 84. Thus, even if warnings are not required when a target is subpoenaed to the grand jury, one might argue that they are required when he is, in effect, subpoenaed to the FBI office, at least when he is then required to provide testimonial communications.

I hasten to note that this argument has not been made here. As stated above, Matos relies solely on the fact that he was subpoenaed to provide exemplars. In any event, the available facts suggest that the option of providing the exemplars to the agents was a more attractive, and less coercive, alternative for Matos than appearing before the grand jury. He was able to arrange a time over the telephone, and thus was not required to appear only when the grand jury was in session. Although the exemplars were provided in the privacy of the agents' office, Matos does not contend that they engaged in coercive tactics. There is no indication that the option to provide the exemplars directly to the agents was viewed by Matos as a mandatory direction. Finally, the presence of grand jurors notwithstanding, an appearance to provide physical evidence or testimony under oath to a federal grand jury can, in some circumstances, be more intimidating even than a visit to the FBI's office. Whether or not that was true here, I find under the totality of the circumstances that there is not even the slightest suggestion that Matos's free will was overborne. *See Minnesota v. Murphy,* 465 U.S. at 431 (declining to require warnings to probationer who was required to answer probation officer's questions where the totality of the circumstances were not such as to overbear the probationer's free will).

In sum, I conclude that neither the grand jury subpoena nor the prosecutor's suggestion of a "convenient alternative" to an appearance before the grand jury, *Smith,* 687 F.2d at 152, created one of those "narrowly defined situations" in which incriminating disclosures may be deemed compelled despite a failure to assert the Fifth Amendment privilege. *Garner,* 424 U.S. at 656.

CONCLUSION

Because the defendant did not claim the Fifth Amendment privilege at the time the handwriting exemplars were given, he is foreclosed from invoking the privilege in order to suppress the handwriting exemplars. Accordingly, the defendant's motion to suppress is denied.

So Ordered.

All Citations

990 F.Supp. 141

Footnotes

1 In papers relating to the motion and at oral argument on December 19, 1997, counsel agreed that the misspelling of the word “drawers” lies at the heart of the defendant's application, and that the exemplars at issue would be used by the government at trial with that word redacted if the motion were granted. This agreement was apparently the result of the government's supplemental subpoena for additional exemplars to be used in the event the motion was granted. On December 30, 1997, another attorney from the Office of the Federal Defender apparently reneged on that agreement, arguing that an order granting the motion would not only “taint” the exemplars, but would also taint the testimony of any expert who was exposed to the misspelling. In light of my disposition of the Fifth Amendment claim, this eleventh-hour argument (which defense counsel conceded is the result of “too many cooks” on the defense team) is denied as well.

477 F.2d 874
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Cecil STEMBRIDGE and Jessie Lee Stembridge, Defendants-Appellants.

No. 72-2042.
|
April 13, 1973.

Synopsis

Defendants were convicted in the United States District Court for the Northern District of Texas, at Ft. Worth, Leo Brewster, Chief Judge, of conspiring with another to rob a federally insured bank and of aiding and abetting in robbery of the bank, and they appealed. The Court of Appeals, Estes, District Judge, held that introduction of evidence that defendant attempted to avoid providing a valid handwriting sample by intentionally distorting his handwriting was not improper and did not violate defendant's privilege against self-incrimination.

Affirmed.

Attorneys and Law Firms

***875** Charles Yarborough, Ft. Worth, Tex. (Court appointed), Sharon Gabert, Ft. Worth, Tex., Bertrand C. Moser, Houston, Tex. (Court appointed for Cecil Stembridge), for defendants-appellants.

Frank D. McCown, U. S. Atty., W. E. Smith, Asst. U. S. Atty., Ft. Worth, Tex., for plaintiff-appellee.

Before COLEMAN and SIMPSON, Circuit Judges, and ESTES, District Judge.

Opinion

ESTES, District Judge:

Appellants, Cecil Stembridge and Jessie Lee Stembridge, his wife, were each convicted of (1) conspiring, in violation of 18 U.S.C. § 371, with one Gerald Loveless to rob a federally insured bank, in violation of 18 U.S.C. § 2113(a) and (2) aiding and abetting Loveless in the robbery of the bank, in violation of 18 U.S.C. §§ 2 and 2113(a). Cecil was sentenced to imprisonment for five years on Count 1 and 20 years on Count 2; Jessie was sentenced to imprisonment for five years on Count 1 and 10 years on Count 2. The sentences were concurrent for both defendants. We affirm.

On December 2, 1971, the Security State Bank of River Oaks, Texas, a federally insured bank, was robbed of approximately $9,250 by Loveless, who drove up to a drive-in teller's window and placed in the teller's drawer a bag containing a fake bomb and a note which read, “There is a bomb in this bag that I can set off by remote control. Give me all the money in one minute or I'll blow this whole booth up.”

At the trial, Loveless, who pleaded guilty, testified that Jessie had printed the robbery note. Appellants' main contention in this appeal concerns the testimony of the government's handwriting expert, James Lile. Lile testified that by comparing the robbery note to handwriting exemplars produced by Jessie and a job application form signed “Jessie Lee Stembridge,” he was able to determine that the same person had prepared the hand-printing on all three exhibits. During a rigorous cross-examination, the defense counsel obtained Lile's admission that when comparing the robbery note with the exemplars of Jessie's writing alone, he was not able to say that the same person printed both. The prosecutor then asked the expert to explain why he could not do so. He answered, “The writings on those nine pages [the exemplars] bear many of the classical characteristics which I have been trained to recognize as attempts of the writer to intentionally disguise or distort normal writing.”

Although recognizing that handwriting/printing exemplars have been held to be identifying physical characteristics outside the protection of the ***876** Fifth Amendment privilege against selfincrimination, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), Jessie contends that her exemplars were improperly used as testimonial evidence. She asserts that the testimony that her exemplars were disguised implies a consciousness of guilt and that implied admission violates her privilege against self-incrimination.

A similar contention was presented to the Second Circuit, in United States v. Izzi, 427 F.2d 293 (2 Cir. 1970), which concluded that the contention was unsupported by the record and, therefore, did not decide the issue. The instant case could also be considered one in which the record does not support

the contention, because the record clearly shows that the prosecution obtained the expert's opinion that the exemplars were disguised not as an implied admission of guilt by Jessie but rather as an explanation of his difficulties in analyzing the handwriting in order to substantiate his analysis after a rigorous cross-examination challenging its validity.

Be that as it may. Prior rulings of this Circuit in comparable situations lead us to reject appellant's contention.

Although identifying physical characteristics are outside the protection of the Fifth Amendment, *Gilbert, supra*; Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), certain characteristics, such as voice and handwriting exemplars, require the physical cooperation of the accused in order to obtain valid samples. The accused has not been permitted to frustrate the prosecution's right to this evidence by simply refusing to give the required exemplars.

In Higgins v. Wainwright, 424 F.2d 177 (5 Cir. 1970), this court held that no constitutional right of an accused was violated by the introduction of evidence that he had refused to speak for identification purposes during a line-up. Also, in United States v. Nix, 465 F.2d 90 (5 Cir. 1972), this court held that it was not improper for the prosecutor in his closing arguments to the jury to comment upon the accused's refusal to provide a handwriting exemplar as directed by the court and, further, that it was not improper for the court to charge the jury that if it found beyond a reasonable doubt that the accused had failed to provide an exemplar as ordered by the court, it might infer that a comparison of such samples with a questioned signature would have been unfavorable to the defendant and favorable to the prosecution. The Second Circuit has likewise stated that the prosecution "can rely before the grand jury and, if an indictment is returned, at trial, on the strong inference to be drawn" from the refusal of an accused to furnish handwriting exemplars. United States v. Doe, 405 F.2d 436, 438 (2 Cir. 1968).

An attempt to disguise the handwriting in an exemplar is, in effect, a refusal to provide an exemplar, for if an accused were free to disguise his writing, without any sanctions, exemplars would be worthless. Hence it is not improper for the prosecution to show that the defendant attempted to avoid providing a valid handwriting sample by intentionally distorting his handwriting.

Another contention in this appeal is that the job application form could not be used for comparison because there was no proof that Jessie had filled out the form. When she took the stand in her own behalf, Jessie admitted that she had signed the form, but when asked if she had filled it out, she equivocated, "I don't know if I did or not." However, Lile testified that the printing on the application form and the handwriting exemplar were produced by the same person. His testimony is sufficient evidence to establish that Jessie produced the printing on the application form. Indeed, in the proposed Federal Rules of Evidence,[*] such proof is expressly ***877** stated to be an "illustration" of "evidence sufficient to support a finding that the matter in question is what its proponent claims." Since there was no objection at the trial to the use of the form, appellant recognizes that, to be sustained in this court, any error would have to be plain error. If there was any error in using the application form, it does not amount to plain error.

We have considered the remaining contentions of the appellants and have found them without merit.

The judgment of the district court is

Affirmed.

All Citations

477 F.2d 874

Footnotes

* Rule 901(a) and (b)(3), Rules of Evidence for the United States Courts and Magistrates (approved Nov. 20, 1972, and transmitted to Congress), [56 F.R.D. 183, 331-332] (1972).

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87 S.Ct. 1926
Supreme Court of the United States

UNITED STATES, Petitioner,

v.

Billy Joe WADE.

No. 334.
|
Argued Feb. 16, 1967.
|
Decided June 12, 1967.

Synopsis

Defendant was convicted before the United States District Court for the Eastern District of Texas of bank robbery, and he appealed. The Court of Appeals, 358 F.2d 557, reversed the conviction and ordered a new trial, and certiorari was granted. The United States Supreme Court, Mr. Justice Brennan, held that post-indictment lineup was critical stage of prosecution at which defendant was as much entitled to aid of counsel as at trial itself, and thus both defendant and his counsel should have been notified of impending lineup, and counsel's presence should have been requisite to conduct of lineup, in absence of intelligent waiver.

Judgment of Court of Appeals vacated and case remanded with direction.

Mr. Chief Justice Warren, Mr. Justice Douglas, Mr. Justice Fortas, Mr. Justice Black, Mr. Justice White, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

Attorneys and Law Firms

****1928** ***219** Beatrice Rosenberg, Washington, D.C., for petitioner.

Weldon Holcomb, Tyler, Tex., for respondent.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for ***220** identification purposes without notice to and in the absence of the accused's appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank's money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade's lawyer, arranged to have the two bank employees observe a lineup ****1929** made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like 'put the money in the bag,' the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade's counsel moved for a judgment of acquittal or, alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The ***221** Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded, holding that, though the lineup did not violate Wade's Fifth Amendment rights, 'the lineup, held as it was, in the absence of counsel, already chosen to represent appellant, was a violation of his Sixth Amendment rights * * *.' 358 F.2d 557, 560. We granted certiorari, 385 U.S. 811, 87 S.Ct. 81, 17 L.Ed.2d 53, and set the case for oral argument with No. 223, Gilbert v. State of California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, and No. 254, Stovall v. Denno, 386 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the

conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I.

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the pivilege 'protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature * * *.' Schmerber v. State of California, 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908. We there held that compelling a suspect to submit to a withdrawal of a sample of his blood for analysis for alcohol content and the admission in evidence of the analysis report were not compulsion to those ends. That holding was supported by the opinion in Holt v. United States, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021, in which case a question arose as to whether a blouse belonged to the defendant. A witness testified at trial that the defendant put on the blouse and it had fit him. The defendant argued that the admission of the testimony was error because compelling him to put on the blouse was a violation of his privilege. The Court ***222** rejected the claim as 'an extravagant extension of the Fifth Amendment,' Mr. Justice Holmes saying for the Court: '(T)he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.' 218 U.S., at 252—253, 31 S.Ct. at 6.

The Court in Holt, however, put aside any constitutional questions which might be involved in compelling an accused, as here, to exhibit himself before victims of or witnesses to an alleged crime; the Court stated, 'we need now consider how far a court would go in compelling ****1930** a man to exhibit himself.' Id., at 253, 31 S.Ct. at 6.[1]

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. It is no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse, and, as in those instances, is not within the cover of the privilege. Similarly, compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying ***223** physical characteristic, not to speak his guilt. We held in Schmerber, supra, 384 U.S. at 761, 86 S.Ct. at 1830, that the distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's 'communications' in whatever form, vocal or physical, and 'compulsion which makes a suspect or accused the source of 'real or physical evidence,'' Schmerber, supra, at 764, 86 S.Ct. at 1832. We recognized that 'both federal and state courts have usually held that * * * (the privilege) offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.' Id., at 764, 86 S.Ct. at 1832. None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II.

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. Our rejection of the right to counsel claim in Schmerber rested on our conclusion in that case that '(n)o issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented.' 384 U.S., at 766, 86 S.Ct. at 1833. In contrast, in this case it is urged that the assistance of counsel at the lineup was indispensable ***224** to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in 'matters of law,' and eschewing any responsibility for 'matters of fact.'[2] The constitutions in at least 11 of the 13 States expressly or impliedly abolished ****1931** this distinction. Powell v. State of Alabama, 287

U.S. 45, 60—65, 53 S.Ct. 55, 60—62, 77 L.Ed. 158; Note, 73 Yale L.J. 1000, 1030—1033 (1964). 'Though the colonial provisions about counsel were in accord on few things, they agreed on the necessity of abolishing the facts-law distinction; the colonists appreciated that if a defendant were forced to stand alone against the state, his case was foredoomed.' 73 Yale L.J., supra, at 1033—1034. This background is reflected in the scope given by our decisions to the Sixth Amendment's guarantee to an accused of the assistance of counsel for his defense. When the Bill of Rights was adopted, there were no organized police forces as we know them today.[3] The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. The guarantee reads: 'In all criminal ***225** prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' (Emphasis supplied.) The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'

As early as Powell v. State of Alabama, supra, we recognized that the period from arraignment to trial was 'perhaps the most critical period of the proceedings * * *,' id., at 57, 53 S.Ct. at 59, during which the accused 'requires the guiding hand of counsel * * *,' id., at 69, 53 S.Ct. at 64 if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment —for example, that provided by Alabama—where certain rights might be sacrificed or lost: 'What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted * * *.' Hamilton v. State of Alabama, 368 U.S. 52, 54, 82 S.Ct. 157, 159, 7 L.Ed.2d 114. See White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193. The principle was also applied in Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. We said, quoting a concurring opinion in Spano v. People of State of New York, 360 U.S. 315, 326, 79 S.Ct. 1202, 1209, 3 L.Ed.2d 1265, that '(a)nything less * * * might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'' 377 U.S., at 204, 84 S.Ct. at 1202.

In Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, we drew upon the rationale of Hamilton and Massiah in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer. We again noted the necessity of counsel's presence ***226** if the accused was to have a fair opportunity to present a defense at the trial itself:
'The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, ****1932** the conviction is already assured by pretrial examination'. * * * 'One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'' 378 U.S., at 487—488, 84 S.Ct. at 1763.

Finally in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.
Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions 'no more than (reflect) a constitutional principle established as long ago as Powell v. Alabama * * *.' Massiah v. United States, supra, 377 U.S. at 205, 84 S.Ct. at 1202. It is central to that principle that in addition to counsel's presence at trial,[4] the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[5] The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the ***227** Sixth Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of

criminal prosecution. Cf. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.

In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III.

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at ***228** trial through the ordinary processes of cross-examination of the Government's ****1933** expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

IV.

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.[6] Mr. Justice Frankfurter once said: 'What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.' The Case of Sacco and Vanzetti 30 (1927). A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator ***229** has observed that '(t)he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.' Wall, Eye-Witness Identification in Criminal Cases 26. Suggestion can be created intentionally or unintentionally in many subtle ways.[7] And the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, '(i)t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.'[8]

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in Stovall v. Denno, supra. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.[9] But ***230** as is the ****1934** case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. 'Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on * * *.' Miranda v. State of Arizona, supra, 384 U.S. at 448, 86 S.Ct. at 1614. For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers;[10] in any event, the participants' names are rarely recorded or divulged at trial.[11] The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that

a victim's understandable outrage may excite vengeful or spiteful motives.[12] In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences.[13] Improper influences ***231** may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.[14] Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain;[15] the jury's choice is between the accused's unsupported version and that of the police officers present.[16] In short, the accused's ***232** inability effectively to reconstruct at trial any unfairness that occurred at the ****1935** lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

What facts have been disclosed in specific cases about the conduct of pretrial confrontations for identification illustrate both the potential for substantial prejudice to the accused at that stage and the need for its revelation at trial. A commentator provides some striking examples:
'In a Canadian case * * * the defendant had been picked out of a lineup of six men, of which he was the only Oriental. On other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short nonsuspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a lineup with five other persons, all of whom were forty or over.'[17]

Similarly state reports, in the course of describing prior identifications admitted as evidence of guilt, reveal ***233** numerous instances of suggestive procedures, for example, that all in the lineup but the suspect were known to the identifying witness,[18] that the other participants in a lineup were grossly dissimilar in appearance to the suspect,[19] that only the suspect was required to wear distinctive clothing which the culprit allegedly wore,[20] that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail,[21] that the suspect is pointed out before ****1936** or during a lineup,[22] and that the participants in the lineup are asked to try on an article of clothing which fits only the suspect.[23]

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying ***234** witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade 'standing in the hall' within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who 'resembled the person that we identified as the one that had entered the bank.'[24]

The lineup in Gilbert, supra, was conducted in an auditorium in which some 100 witnesses to several alleged state and federal robberies charged to Gilbert made wholesale identifications of Gilbert as the robber in each other's presence, a procedure said to be fraught with dangers of suggestion.[25] And the vice of suggestion created by the identification in Stovall, supra, was the presentation to the witness of the suspect alone handcuffed to police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police. See Frankfurter, The Case of Sacco and Vanzetti 31—32.

The few cases that have surfaced therefore reveal the existence of a process attended with hazards of serious unfairness to the criminal accused and strongly suggest the plight of the more numerous defendants who are unable to ferret out suggestive influences in the ***235** secrecy of the confrontation. We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification. Williams & Hammelmann, in one of the most comprehensive studies of such forms of identification, said, '(T)he fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense, and that their chief pre-occupation is with the problem of getting sufficient proof, because he has not 'come clean,' involves a a danger that this persuasion may communicate itself even in a

doubtful case to the witness in some way * * *.' Identification Parades, Part I, (1963) Crim.L.Rev. 479, 483.

Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute **1937 assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no *236 effective appeal from the judgment there rendered by the witness—'that's the man.'

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial,[26] there can be *237 little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel) * * * as at the trial itself.' Powell v. State of Alabama, 287 U.S. 45, at 57, 53 S.Ct. 55, at 60, 77 L.Ed. 158. Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an 'intelligent waiver.' See Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70. No substantial countervailing policy considerations have been advanced against the requirement of the presence of counsel. Concern is expressed that the requirement will forestall prompt identifications and result in obstruction of the confrontations. As for the first, **1938 we note that in the two cases in which the right to counsel is today held to apply, counsel had already been appointed and no argument is made in either case that notice to counsel would have prejudicially delayed the confrontations. Moreover, we leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.[27] And to refuse to recognize the right to counsel for fear that counsel will obstruct the course of justice is contrary to the *238 basic assumptions upon which this Court has operated in Sixth Amendment cases. We rejected similar logic in Miranda v. State of Arizona, concerning presence of counsel during custodial interrogation, 384 U.S. at 480—481, 86 S.Ct. at 1631, 16 L.Ed.2d 694:

'(A)n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.' In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's indentification evidence.[28] That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.[29]

*239 Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'[30] But neither Congress nor the **1939 federal authorities have seen fit to provide a solution. What we hold today 'in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect.' Miranda v. State of Arizona, supra, at 467, 86 S.Ct. at 1624.

V.

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is *240 to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. See Murphy v. Waterfront Commission, 378 U.S. 52, 79, n. 18, 84 S.Ct. 1594, 1609, 12 L.Ed.2d 678.[31] Where, as here, the admissibility of

evidence of the lineup identification itself is not involved, a per se rule of exclusion of courtroom identification would be unjustified.[32] See Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 267, 84 L.Ed. 307. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identifications, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark ***241** in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is that quoted in Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, "(W)hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959).' ****1940** See also Hoffa v. United States, 385 U.S. 293, 309, 87 S.Ct. 408, 17 L.Ed.2d 374. Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.[33]

***242** We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. The court stated that 'it cannot be said with any certainty that they would have recognized appellant at the time of trial if this intervening lineup had not occurred,' and that the testimony of the two witnesses 'may well have been colored by the illegal procedure (and) was prejudicial.' 358 F.2d, at 560. Moreover, the court was persuaded, in part, by the 'compulsory verbal responses made by Wade at the instance of the Special Agent.' Ibid. This implies the erroneous holding that Wade's privilege against self-incrimination was violated so that the denial of counsel required exclusion.

On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error, Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, and for the District Court to reinstate the conviction or order a new trial, as may be proper. See United States v. Shotwell Mfg. Co., 355 U.S. 233, 245—246, 78 S.Ct. 245, 253, 2 L.Ed.2d 234.

***243** The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion. It is so ordered.

Judgment of Court of Appeals vacated and case remanded with direction.

THE CHIEF JUSTICE joins the opinion of the Court except for Part I, from which he dissents for the reasons expressed in the opinion of Mr. Justice FORTAS.

Mr. Justice DOUGLAS joins the opinion of the Court except for Part I. On that phase of the case he adheres to the dissenting views in ****1941** Schmerber v. State of California, 384 U.S. 757, 772—779, 86 S.Ct. 1826, 16 L.Ed.2d 908, since he believes that compulsory lineup violates the privilege against self-incrimination contained in the Fifth Amendment.

Mr. Justice CLARK, concurring.

With reference to the lineup point involved in this case I cannot, for the life of me, see why a lineup is not a critical stage of the prosecution. Identification of the suspect—a prerequisite to establishment of guilt—occurs at this stage, and with Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), on the books, the requirement of the presence of counsel arises, unless waived by the suspect. I dissented in Miranda but I am bound by it now, as we all are. Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), precludes petitioner's claim of self-incrimination. I therefore join the opinion of the Court.

Mr. Justice BLACK, dissenting in part and concurring in part.

On March 23, 1965, respondent Wade was indicted for robbing a bank; on April 2, he was arrested; and on April 26, the court appointed a lawyer to represent him. ***244** Fifteen days later while Wade was still in custody, an FBI agent took him and several other prisoners into a room at the courthouse, directed each to participate in a lineup wearing strips of tape on his face and to speak the words used by the robber at the bank. This was all done in order to let the bank employee witnesses look at Wade for identification purposes. Wade's lawyer was not notified of or present at the lineup to protect his client's interests. At Wade's trial, two bank employees identified him in the courtroom. Wade objected to this testimony, when, on cross-examination, his counsel elicited from these witnesses the fact that they had seen Wade in the lineup. He contended that by forcing him to participate in the lineup, wear strips of tape on his face, and repeat the words used by the robber, all without counsel, the Government had (1) compelled him to be a witness against himself inviolation of the Fifth Amendment, and (2) deprived him of the assistance of counsel for his defense in violation of the Sixth Amendment.

The Court in Part I of its opinion rejects Wade's Fifth Amendment contention. From that I dissent. In Parts II—IV of its opinion, the Court sustains Wade's claim of denial of right to counsel in the out-of-court lineup, and in that I concur. In Part V, the Court remands the case to the District Court to consider whether the courtroom identification of Wade was the fruit of the illegal lineup, and, if it was, to grant him a new trial unless the court concludes that the courtroom identification was harmless error. I would reverse the Court of Appeals' reversal of Wade's conviction, but I would not remand for further proceedings since the prosecution not having used the out-of-court lineup identification against Wade at his trial, I believe the conviction should be affirmed.

***245** I.

In rejecting Wade's claim that his privilege against self-incrimination was violated by compelling him to appear in the lineup wearing the tape and uttering the words given him by the police, the Court relies on the recent holding in Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. In that case the Court held that taking blood from a man's body against his will in order to convict him of a crime did not compel him to be a witness against himself. I dissented from that holding, 384 U.S., at 773, 86 S.Ct., at 1837, and still dissent. The Court's reason for its holding was that the sample of Schmerber's blood taken in order to convict him of crime was neither 'testimonial' nor 'communicative' evidence. I think it was both. It seems quite plain to me that the Fifth Amendment's Self-incrimination Clause was designed to bar ****1942** the Government from forcing any person to supply proof of his own crime, precisely what Schmerber was forced to do when he was forced to supply his blood. The Government simply took his blood against his will and over his counsel's protest for the purpose of convicting him of crime. So here, having Wade in its custody awaiting trial to see if he could or would be convicted of crime, the Government forced him to stand in a lineup, wear strips on his face, and speak certain words, in order to make it possible for government witnesses to identify him as a criminal. Had Wade been compelled to utter these or any other words in open court, it is plain that he would have been entitled to a new trial because of having been compelled to be a witness against himself. Being forced by the Government to help convict himself and to supply evidence against himself by talking outside the courtroom is equally violative of his constitutional right not to be compelled to be a witness against himself. Consequently, because of this violation of the Fifth Amendment, ***246** and not because of my own personal view that the Government's conduct was 'unfair,' 'prejudicial,' or 'improper,' I would prohibit the prosecution's use of lineup identification at trial.

II.

I agree with the Court, in large part because of the reasons it gives, that failure to notify Wade's counsel that Wade was to be put in a lineup by government officers and to be forced to talk and wear tape on his face denied Wade the right to counsel in violation of the Sixth Amendment. Once again, my

reason for this conclusion is solely the Sixth Amendment's guarantee that 'the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' As this Court's opinion points out, '(t)he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'' And I agree with the Court that a lineup is a 'critical stage' of the criminal proceedings against an accused, because it is a stage at which the Government makes use of his custody to obtain crucial evidence against him. Besides counsel's presence at the lineup being necessary to protect the defendant's specific constitutional rights to confrontation and the assistance of counsel at the trial itself, the assistance of counsel at the lineup is also necessary to protect the defendant's in-custody assertion of his privilege against self-incrimination, Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, for, contrary to the Court, I believe that counsel may advise the defendant not to participate in the lineup or to participate only under certain conditions.

I agree with the Court that counsel's presence at the lineup is necessary to protect the accused's right to a 'fair trial,' only if by 'fair trial' the Court means a trial in accordance with the 'Law of the Land' as specifically set out in the Constitution. But there are ***247** implications in the Court's opinion that by a 'fair trial' the Court means a trial which a majority of this Court deems to be 'fair' and that a lineup is a 'critical stage' only because the Court, now assessing the 'innumerable dangers' which inhere in it, thinks it is such. That these implications are justified is evidenced by the Court's suggestion that '(l)egislative or other regulations * * * which eliminate the risks of abuse * * * at lineup proceedings * * * may also remove the basis for regarding the stage as 'critical.'' And it is clear from the Court's opinion in Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, that it is willing to make the Sixth Amendment's guarantee of right to counsel dependent on the Court's own view of whether a particular stage of the proceedings—though 'critical' in the sense of the prosecution's gathering of evidence—is 'critical' to the Court's own view of a 'fair trial.' I am wholly unwilling to make the specific constitutional ****1943** right of counsel dependent on judges' vague and transitory notions of fairness and their equally transitory, though thought to be empirical, assessment of the 'risk that * * * counsel's absence * * * might derogate from * * * (a defendant's) right to a fair trial.' Ante, at 1933. See Pointer v. State of Texas, 380 U.S. 400, 412, 85 S.Ct. 1065, 1072, 13 L.Ed.2d 923 (concurring opinion of Goldberg, J.).

III.

I would reverse Wade's conviction without further ado had the prosecution at trial made use of his lineup identification either in place of courtroom identification or to bolster in a harmful manner crucial courtroom identification. But the prosecution here did neither of these things. After prosecution witnesses under oath identified Wade in the courtroom, it was the defense, and not the prosecution, which brought out the prior lineup identification. While stating that 'a per se rule of exclusion of courtroom identification would be unjustified,' the Court, nevertheless remands this case for 'a ***248** hearing to determine whether the incourt identifications had an independent source,' or were the tainted fruits of the invalidly conducted lineup. From this holding I dissent.

In the first place, even if this Court has power to establish such a rule of evidence, I think the rule fashioned by the Court is unsound. The 'tained fruit' determination required by the Court involves more than considerable difficulty. I think it is practically impossible. How is a witness capable of probing the recesses of his mind to draw a sharp line between a courtroom identification due exclusively to an earlier lineup and a courtroom identification due to memory not based on the lineup? What kind of 'clear and convincing evidence' can the prosecution offer to prove upon what particular events memories resulting in an in-court identification rest? How long will trials be delayed while judges turn psychologists to probe the subconscious minds of witnesses? All these questions are posed but not answered by the Court's opinion. In my view, the Fifth and Sixth Amendments are satisfied if the prosecution is precluded from using lineup identification as either an alternative to or corroboration of courtroom identification. If the prosecution does neither and its witnesses under oath identify the defendant in the courtroom, then I can find no justification for stopping the trial in midstream to hold a lengthy 'tainted fruit' hearing. The fact of and circumstances surrounding a prior lineup identification might be used by the defense to impeach the credibility of the in-court identifications, but not to exclude them completely.

But more important, there is no constitutional provision upon which I can rely that directly or by implication gives this Court power to establish what amounts to a constitutional rule of evidence to govern, not only the Federal Government, but the States in their trial of state ***249** crimes under state laws in state courts. See Gilbert v. California, supra. The Constitution deliberately reposed in the States very broad power to create and to try crimes according to their own rules

and policies. Spencer v. State of Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606. Before being deprived of this power, the least that they can ask is that we should be able to point to a federal constitutional provision that either by express language or by necessary implication grants us the power to fashion this novel rule of evidence to govern their criminal trials. Cf. Berger v. New York, 388 U.S. 70, 87 S.Ct. 1889, 18 L.Ed.2d 1040 (Black, J., dissenting). Neither Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307, nor Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, both federal cases and both decided 'in other contexts,' supports what the Court demands of the States today.

Perhaps the Court presumes to write this constitutional rule of evidence on the basis of the Fourteenth Amendment's **1944 Due Process Clause. This is not the time or place to consider that claim. Suffice it for me to say briefly that I find no such authority in the Due Process Clause. It undoubtedly provides that a person must be tried in accordance with the 'Law of the Land.' Consequently, it violates due process to try a person in a way prohibited by the Fourth, Fifth, or Sixth Amendments of our written Constitution. But I have never been able to subscribe to the dogma that the Due Process Clause empowers this Court to declare any law, including a rule of evidence, unconstitutional which it believes is contrary to tradition, decency, fundamental justice, or any of the other widemeaning words used by judges to claim power under the Due Process Clause. See, e.g., Rochin v. People of State of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183. I have an abiding idea that if the Framers had wanted to let judges write the Constitution on any such day-to-day beliefs of theirs, they would have said so instead of so carefully defining their grants and prohibitions in a written constitution. *250 With no more authority than the Due Process Clause I am wholly unwilling to tell the state or federal courts that the United States Constitution forbids them to allow courtroom identification without the prosecution's first proving that the identification does not rest in whole or in part on an illegal lineup. Should I do so, I would feel that we are deciding what the Constitution is, not from what it says, but from what we think it would have been wise for the Framers to put in it. That to me would be 'judicial activism' at its worst. I would leave the States and Federal Government free to decide their own rules of evidence. That, I believe, is their constitutional prerogative.

I would affirm Wade's conviction.

Mr. Justice WHITE, whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting in part and concurring in part.

The Court has again propounded a broad constitutional rule barring the use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel. This was the approach of the Court in Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. I objected then to what I thought was an uncritical and doctrinaire approach without satisfactory factual foundation. I have much the same view of the present ruling and therefore dissent from the judgment and from Parts II, IV, and V of the Court's opinion.

The Court's opinion is far-reaching. It proceeds first by creating a new per se rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. If he is, the State may not buttress a later courtroom identification, of the witness by any reference to the previous identification. Furthermore, the courtroom identification is not admissible *251 at all unless the State can establish by clear and convincing proof that the testimony is not the fruit of the earlier identification made in the absence of defendant's counsel—admittedly a heavy burden for the State and probably an impossible one. To all intents and purposes, courtroom identifications are barred if pretrial identifications have occurred without counsel being present.

The rule applies to any lineup, to any other techniques employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information. It matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime. The kidnap victim who has **1945 lived for days with his abductor is in the same category as the witness who has had only a fleeting glimpse of the criminal. Neither may identify the suspect without defendant's counsel being present. The same strictures apply regardless of the number of other witnesses who positively identify the defendant and regardless of the corroborative evidence showing that it was the defendant who had committed the crime.

The premise for the Court's rule is not the general unreliability of eyewitness identifications nor the difficulties inherent in observation, recall, and recognition. The Court assumes a narrower evil as the basis for its rule—improper police suggestion which contributes to erroneous identifications. The Court apparently believes that improper police procedures are so widespread that a broad prophylactic rule must be laid down, requiring the presence of counsel at all pretrial identifications, in ***252** order to detect recurring instances of police misconduct.[1] I do not share this pervasive distrust of all official investigations. None of the materials the Court relies upon supports it.[2] Certainly, I would bow to solid fact, but the Court quite obviously does not have before it any reliable, comprehensive survey of current police practices on which to base its new rule. Until it does, the Court should avoid excluding relevant evidence from state criminal trials. Cf. Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019.

The Court goes beyond assuming that a great majority of the country's police departments are following improper practices at pretrial identifications. To find the lineup a 'critical' stage of the proceeding and to exclude identifications made in the absence of counsel, the Court must also assume that police 'suggestion,' if it occurs at all, leads to erroneous rather than accurate identifications and that reprehensible police conduct will have an unavoidable and largely undiscoverable impact on the trial. This in turn assumes that there is now no adequate source from which defense counsel can learn about the circumstances of the pretrial identification in order to place before the jury all of the considerations which should enter into an appraisal of courtroom identification ***253** evidence. But these are treacherous and unsupported assumptions[3] resting as they do ****1946** on the notion that the defendant will not be aware, that the police and the witnesses will forget or prevaricate, that defense counsel will be unable to bring out the truth and that neither jury, judge, nor appellate court is a sufficient safeguard against unacceptable police conduct occurring at a pretrial identification procedure. I am unable to share the Court's view of the willingness of the police and the ordinary citizenwitness to dissemble, either with respect to the identification of the defendant or with respect to the circumstances surrounding a pretrial identification.

There are several striking aspects to the Court's holding. First, the rule does not bar courtroom identifications where there have been no previous identifications in the presence of the police, although when identified in the courtroom, the defendant is known to be in custody and charged with the commission of a crime. Second, the Court seems to say that if suitable legislative standards were adopted for the conduct of pretrial identifications, thereby lessening the hazards in such confrontations, ***254** it would not insist on the presence of counsel. But if this is true, why does not the Court simply fashion what it deems to be constitutionally acceptable procedures for the authorities to follow? Certainly the Court is correct in suggesting that the new rule will be wholly inapplicable where police departments themselves have established suitable safeguards.

Third, courtroom identification may be barred, absent counsel at a prior identification, regardless of the extent of counsel's information concerning the circumstances of the previous confrontation between witness and defendant—apparently even if there were recordings or sound-movies of the events as they occurred. But if the rule is premised on the defendant's right to have his counsel know, there seems little basis for not accepting other means to inform. A disinterested observer, recordings, photographs—any one of them would seem adequate to furnish the basis for a meaningful cross-examination of the eyewitness who identifies the defendant in the courtroom.

I share the Court's view that the criminal trial, at the very least, should aim at truthful factfinding, including accurate eyewitness identifications. I doubt, however, on the basis of our present information, that the tragic mistakes which have occurred in criminal trials are as much the product of improper police conduct as they are the consequence of the difficulties inherent in eyewitness testimony and in resolving evidentiary conflicts by court or jury. I doubt that the Court's new rule will obviate these difficulties, or that the situation will be measurably improved by inserting defense counsel into the investigative processes of police departments eyerywhere.

But, it may be asked, what possible state interest militates against requiring the presence of defense counsel at lineups? After all, the argument goes, he may do some good, he may upgrade the quality of identification evidence in state courts and he can scarcely do any ***255** harm. Even if true, this is a feeble foundation for fastening an ironclad constitutional rule upon state criminal procedures. Absent some reliably established constitutional violation, the processes by which the States enforce their criminal laws are their own prerogative. The States do have an interest in conducting their own affairs, an interest which cannot be displaced simply by saying that there are no valid arguments

with respect to the merits of a federal rule emanating from this Court.

Beyond this, however, requiring counsel at pretrial identifications as an invariable **1947 rule trenches on other valid state interests. One of them is its concern with the prompt and efficient enforcement of its criminal laws. Identifications frequently take place after arrest but before an indictment is returned or an information is filed. The police may have arrested a suspect on probable cause but may still have the wrong man. Both the suspect and the State have every interest in a prompt identification at that stage, the suspect in order to secure his immediate release and the State because prompt and early identification enhances accurate identification and because it must know whether it is on the right investigative track. Unavoidably, however, the absolute rule requiring the presence of counsel will cause significant delay and it may very well result in no pretrial identification at all. Counsel must be appointed and a time arranged convenient for him and the witnesses. Meanwhile, it may be necessary to file charges against the suspect who may then be released on bail, in the federal system very often on his own recognizance, with neither the State nor the defendant having the benefit of a properly conducted identification procedure.

Nor do I think the witnesses themselves can be ignored. They will now be required to be present at the convenience of counsel rather than their own. Many may be much less willing to participate if the identification *256 stage is transformed into an adversary proceeding not under the control of a judge. Others may fear for their own safety if their identity is known at an early date, especially when there is no way of knowing until the lineup occurs whether or not the police really have the right man.[4]

Finally, I think the Court's new rule is vulnerable in terms of its own unimpeachable purpose of increasing the reliability of identification testimony.

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime.[5] To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must *257 be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the **1948 evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.[6] Our interest in not convicting *258 the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe[7] but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

I would not extend this system, at least as it presently operates, to police investigations and would not require counsel's presence at pretrial identification procedures. Counsel's interest is in not having his client placed at the scene of the crime, regardless of his whereabouts. Some counsel may advise their clients to refuse to make any *259 movements or to speak any words in a lineup or even to **1949 appear in one. To that extent the impact on truthful factfinding is quite obvious. Others will not only observe what occurs and develop possibility for later cross-examination but will hover over witnesses and begin their cross-examination then, menacing truthful factfinding as thoroughly as the Court fears the police now do. Certainly there is an implicit invitation to counsel to suggest rules for the lineup and to manage and produce it as best he can. I therefore doubt that the Court's new rule, at least absent some clearly defined limits on counsel's role, will measurably contribute to more reliable pretrial identifications. My fears are that it will have precisely the opposite result. It may well produce fewer convictions, but that is hardly a proper measure of its long-run acceptability. In my view, the State is entitled to investigate and develop its case outside the presence of defense counsel. This includes the right to have private conversations with identification witnesses, just as defense counsel may have his own consultations with these and other witnesses without having the prosecutor present.

Whether today's judgment would be an acceptable exercise of supervisory power over federal courts is another question. But as a constitutional matter, the judgment in this case is erroneous and although I concur in Parts I and III of the Court's opinion I respectfully register this dissent.

Mr. Justice FORTAS, with whom THE CHIEF JUSTICE and Mr. Justice DOUGLAS join, concurring in part and dissenting in part.

1. I agree with the Court that the exhibition of the person of the accused at a lineup is not itself a violation of the privilege against self-incrimination. In itself, it is no more subject to constitutional objection ***260** than the exhibition of the person of the accused in the courtroom for identification purposes. It is an incident of the State's power to arrest, and a reasonable and justifiable aspect of the State's custody resulting from arrest. It does not require that the accused take affirmative, volitional action, but only that, having been duly arrested he may be seen for identification purposes. It is, however, a 'critical stage' in the prosecution, and I agree with the Court that the opportunity to have counsel present must be made available.

2. In my view, however, the accused may not be compelled in a lineup to speak the words uttered by the person who committed the crime. I am confident that it could not be compelled in court. It cannot be compelled in a lineup. It is more than passive, mute assistance to the eyes of the victim or of witnesses. It is the kind of volitional act—the kind of forced cooperation by the accused—which is within the historical permeter of the privilege against compelled self-incrimination.

Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, 'Your money or your life'—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system.

I completely agree that the accused must be advised of and given the right to counsel before a lineup—and I join in that part of the Court's opinion; but this is an empty right unless we mean to insist upon the accused's fundamental constitutional immunities. One of these is that the accused may not be compelled to speak. To compel him to speak would violate the privilege ***261** against self-incrimination, ****1950** which is incorporated in the Fifth Amendment.

This great privilege is not merely a shield for the accused. It is also a prescription of technique designed to guide the State's investigation. History teaches us that self-accusation is an unreliable instrument of detection, apt to inculpate the innocent-but-weak and to enable the guilty to escape. But this is not the end of the story. The privilege historically goes to the roots of democratic and religious principle. It prevents the debasement of the citizen which would result from compelling him to 'accuse' himself before the power of the state. The roots of the privilege are deeper than the rack and the screw used to extrot confessions. They go to the nature of a free man and to his relationship to the state.

An accused cannot be compelled to utter the words spoken by the criminal in the course of the crime. I thoroughly disagree with the Court's statement that such compulsion does not violate the Fifth Amendment. The Court relies upon Schmerber v. State of California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), to support this. I dissented in Schmerber but if it were controlling here, I should, of course, acknowledge its binding effect unless we were prepared to overrule it. But Schmerber, which authorized the forced extraction of blood from the veins of an unwilling human being, did not compel the person actively to cooperate—to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime, which, I assume, would be rebuffed by the Court. It is the latter feature which places the compelled utterance by the accused squarely within the history and noble purpose of the Fifth Amendment's commandment.

To permit Schmerber to apply in any respect beyond its holding is, in my opinion, indefensible. To permit ***262** its insidious doctrine to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith and to discard one of the most profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the balance between the rights of the individual and of the state, achieved over centuries of conflict.

3. While the Court holds that the accused must be advised of and given the right to counsel at the lineup, it makes the privilege meaningless in this important respect. Unless counsel has been waived or, being present, has not objected to the accused's utterance of words used in the course

of committing the crime, to compel such an utterance is constitutional error.*

Accordingly, while I join the Court in requiring vacating of the judgment below for a determination as to whether the identification of respondent was based upon factors independent of the lineup, I would do so not only because of the failure to offer counsel before the lineup but also because of the violation of respondent's Fifth Amendment rights.

All Citations

388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149

Footnotes

1 Holt was decided before Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, fashioned the rule excluding illegally obtained evidence in a federal prosecution. The Court therefore followed Adams v. People of State of New York, 192 U.S. 585, 24 S.Ct. 372, 48 L.Ed. 575, in holding that, in any event, 'when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent.' 218 U.S., at 253, 31 S.Ct. at 6.

2 See Powell v. State of Alabama, 287 U.S. 45, 60—65, 53 S.Ct. 55, 60—62, 77 L.Ed. 158; Beaney, Right to Counsel in American Courts 8—26.

3 See Note, 73 Yale L.J. 1000, 1040—1042 (1964); Comment, 53 Calif.L.Rev. 337, 347—348 (1965).

4 See, e.g., Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114; White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193; Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977; Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246.

5 See cases cited n. 4, supra; Avery v. State of Alabama, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377.

6 Borchard, Convicting the Innocent; Frank & Frank, Not Guilty; Wall, Eye-Witness Identification in Criminal Cases; 3 Wigmore, Evidence s 786a (3d ed. 1940); Rolph, Personal Identity; Gross, Criminal Investigation 47—54 (Jackson ed. 1962); Williams, Proof of Guilt 83—98 (1955); Wills, Circumstantial Evidence 192—205 (7th ed. 1937); Wigmore, The Science of Judicial Proof ss 250—253 (3d ed. 1937).

7 See Wall, supra, n. 6, at 26—65; Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L.Rev. 610; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col.L.Rev. 94, 98—99 (1966); Williams, Identification Parades, (1955) Crim.L.Rev. (Eng.) 525; Paul, Indemnification of Accused Persons, 12 Austl.L.J. 42 (1938); Houts, From Evidence to Proof 25; Williams & Hammelmann, Identification Parades, Parts I & II, (1963) Crim.L.Rev. 479—490, 545—555; Gorphe, Showing Prisoners to Witnesses for Identification, 1 Am.J.Police Sci. 79 (1930); Wigmore, The Science of Judicial Proof, supra, n. 6, at s 253; Devlin, The Criminal Prosecution in England 70; Williams, Proof of Guilt 95—97.

8 Williams & Hammelmann, Identification Parades, Part I, (1963) Crim.L.Rev. 479, 482.

9 Williams & Hammelmann, Identification Parades, Part I, supra, n. 7.

10 See Wall, supra, n. 6, at 57—59; see, e.g., People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963); People v. James, 218 Cal.App.2d 166, 32 Cal.Rptr. 283 (1963).

11 See Rolph, Personal Identity 50: 'The bright burden of identity, at these parades, is lifted from the innocent participants to hover about the suspect, leaving the rest featureless and unknown and without interest.'

12 See Williams & Hammelmann, Identification Parades, Part II, (1963) Crim.L.Rev. 545, 546; Borchard, Convicting the Innocent 367.

13 An additional impediment to the detection of such influences by participants, including the suspect, is the physical conditions often surrounding the conduct of the lineup. In many, lights shine on the stage in such a way that the suspect

cannot see the witness. See Gilbert v. United States, 366 F.2d 923 (C.A.9th Cir. 1966). In some a one-way mirror is used and what is said on the witness' side cannot be heard. See Rigney v. Hendrick, 355 F.2d 710, 711, n. 2 (C.A.3d Cir. 1965); Aaron v. State, 273 Ala. 337, 139 So.2d 309 (1961).

14 Williams & Hammelmann, Part I, supra, n. 7, at 489; Napley, supra, n. 7, at 99.

15 See In re Groban, 352 U.S. 330, 340, 77 S.Ct. 510, 516, 1 L.Ed.2d 376 (Black, J., dissenting). The difficult position of defendants in attempting to protest the manner of pretrial identification is illustrated by the many state court cases in which contentions of blatant abuse rested on their unsupportable allegations, usually controverted by the police officers present. See, e.g., People v. Shields, 70 Cal.App.2d 628, 634—635, 161 P.2d 475, 478—479 (1945); People v. Hicks, 22 Ill.2d 364, 176 N.E.2d 810 (1961); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); Redmon v. Commonwealth, 321 S.W.2d 397 (Ky.Ct.App.1959); Lubinski v. State, 180 Md. 1, 8, 22 A.2d 455, 459 (1941). For a striking case in which hardly anyone agreed upon what occurred at the lineup, including who identified whom, see Johnson v. State, 237 Md. 283, 206 A.2d 138 (1965).

16 An instructive example of the defendant's predicament may be found in Proctor v. State, 223 Md. 394, 164 A.2d 708 (1960). A prior identification is admissible in Maryland only under the salutary rule that it cannot have been made ‘under conditions of unfairness or unreliability.’ Id., at 401, 164 A.2d, at 712. Against the defendant's contention that these conditions had not been met, the Court stated:

‘In the instant case, there are no such facts as, in our judgment, would call for a finding that the identification * * * was made under conditions of unfairness or unreliability. The relatively large number of persons but into the room together for (the victim) to look at is one circumstance indicating fairness, and the fact that the police officer was unable to remember the appearances of the others and could not recall if they had physical characteristics similar to (the defendant's) or not is at least suggestive that they were not of any one type or that they all differed markedly in looks from the defendant. There is no evidence that the Police Sergeant gave the complaining witness any indication as to which of the thirteen men was the defendant; the Sergeant's testimony is simply that he asked (the victim) if he could identify (the defendant) after having put the thirteen men in the courtroom.’

17 Wall, Eye-Witness Identification in Criminal Cases 53. For other such examples see Houts, From Evidence to Proof 25; Frankfurter, The Case of Sacco and Vanzetti 12—14, 30—32; 3 Wigmore, Evidence s 786a, at 164, n. 2 (3d ed. 1940); Paul, Identification of Accused Persons, 12 Austl.L.J. 42, 44 (1938); Rolph, Personal Identity 34—43.

18 See People v. James, 218 Cal.App.2d 166, 170—171, 32 Cal.Rptr. 283, 286 (1963); People v. Boney, 28 Ill.2d 505, 192 N.E.2d 920 (1963).

19 See Fredricksen v. United States, 105 U.S.App.D.C. 262, 266 F.2d 463 (1959); People v. Adell, 75 Ill.App.2d 385, 221 N.E.2d 72 (1966); State v. Hill, 193 Kan. 512, 394 P.2d 106 (1964); People v. Seppi, 221 N.Y. 62, 116 N.E. 793 (1917); State v. Duggan, 215 Or. 151, 162, 333 P.2d 907, 912 (1958).

20 See People v. Crenshaw, 15 Ill.2d 458, 460, 155 N.E.2d 599, 602 (1959); Presley v. State, 224 Md. 550, 168 A.2d 510 (1961); State v. Ramirez, 76 N.M. 72, 412 P.2d 246 (1966); State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927); Barrett v. State, 190 Tenn. 366, 229 S.W.2d 516, 18 A.L.R.2d 789 (1950).

21 See Aaron v. State, 273 Ala. 337, 139 So.2d 309 (1961); Bishop v. State, 236 Ark. 12, 364 S.W.2d 676 (1963); People v. Thompson, 406 Ill. 555, 94 L.Ed.2d 349 (1950); People v. Berne, 384 Ill. 334, 51 N.E.2d 578 (1943); People v. Martin, 304 Ill. 494, 136 N.E. 711 (1922); Barrett v. State, 190 Tenn. 366, 229 S.W.2d 516, 18 A.L.R.2d 789 (1950).

22 See People v. Clark, 28 Ill.2d 423, 192 N.E.2d 851 (1963); Gillespie v. State, 355 P.2d 451, 454 (Okl.Cr.1960).

23 See People v. Parham, 60 Cal.2d 378, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963).

24 See Wall, supra, n. 6, at 48; Napley, supra, n. 7, at 99: ‘(W)hile many identification parades are conducted by the police with scrupulous regard for fairness, it is not unknown for the identifying witness to be placed in a position where he can see the suspect before the parade forms * * *.’

25 Williams & Hammelmann, Part, I, supra, n. 7, at 486; Burtt, Applied Psychology 254—255.

26 One commentator proposes a model statute providing not only for counsel, but other safeguards as well:

'Most, if not all, of the attacks on the the lineup process could be averted by a uniform statute modeled upon the best features of the civilian codes. Any proposed statute should provide for the right to counsel during any lineup or during any confrontation. Provision should be made that any person, whether a victim or a witness, must give a description of the suspect before he views any arrested person. A written record of this description should be required, and the witness should be made to sign it. This written record would be available for inspection by defense counsel for copying before the trial and for use at the trial in testing the accuracy of the identification made during the lineup and during the trial.

'This ideal statute would require at least six persons in addition to the accused in a lineup, and these persons would have to be of approximately the same height, weight, coloration of hair and skin, and bodily types as the suspect. In addition, all of these men should, as nearly as possible, be dressed alike. If distinctive garb was used during the crime, the suspect should not be forced to wear similar clothing in the lineup unless all of the other persons are similarly garbed. A complete written report of the names, addresses, descriptive details of the other persons in the lineup, and of everything which transpired during the identification would be mandatory. This report would include everything stated by the identifying witness during this step, including any reasons given by him as to what features, etc., have sparked his recognition.

'This statute should permit voice identification tests by having each person in the lineup repeat identical innocuous phrases, and it would be impermissible to force the use of words allegedly used during a criminal act.

'The statute would enjoin the police from suggesting to any viewer that one or more persons in the lineup had been arrested as a suspect. If more than one witness is to make an identification, each witness should be required to do so separately and should be forbidden to speak to another witness until all of them have completed the process.

'The statute could require the use of movie cameras and tape recorders to record the lineup process in those states which are financially able to afford these devices. Finally, the statute should provide that any evidence obtained as the result of a violation of this statute would be inadmissible.' Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L.Rev. 610, 627—628.

27 Although the right to counsel usually means a right to the suspect's own counsel, provision for substitute counsel may be justified on the ground that the substitute counsel's presence may eliminate the hazards which render the lineup a critical stage for the presence of the suspect's own counsel.

28 Concern is also expressed that the presence of counsel will force divulgence of the identity of government witnesses whose identity the Government may want to conceal. To the extent that this is a valid or significant state interest there are police practices commonly used to effect concealment, for example, masking the fase.

29 Many other nations surround the lineup with safeguards against prejudice to the suspect. In England the suspect must be allowed the presence of his solicitor or a friend, Napley, supra, n. 7, at 98—99; Germany requires the presence of retained counsel; France forbids the confrontation of the suspect in the absence of his counsel; Spain, Mexico, and Italy provide detailed procedures prescribing the conditions under which confrontation must occur under the supervision of a judicial officer who sees to it that the proceedings are officially recorded to assure adequate scrutiny at trial. Murray, The Criminal Lineup at Home and Abroad, 1966 Utah L.Rev. 610, 621—627.

30 Thirty years ago Wigmore suggested a 'scientific method' of pretrial identification 'to reduce the risk of error hitherto inherent in such proceedings.' Wigmore, The Science of Judicial Proof 541 (3d ed. 1937). Under this approach, at least 100 talking films would be prepared of men from various occupations, races, etc. Each would be photographed in a number of stock movements, with and without hat and coat, and would read aloud a standard passage. The suspect would be filmed in the same manner. Some 25 of the films would be shown in succession in a special projection room in which each witness would be provided an electric button which would activate a board backstage when pressed to indicate that the witness had identified a given person. Provision would be made for the degree of hesitancy in the identification to be indicated by the number of presses. Id., at 540—541. Of course, the more systematic and scientific a process or proceeding, including one for purposes of identification, the less the impediment to reconstruction of the

conditions bearing upon the reliability of that process or proceeding at trial. See discussion of fingerprint and like tests, Part III, supra, and of handwriting exemplars in Gilbert v. California, supra.

31 See Goldstein v. United States, 316 U.S. 114, 124, n. 1, 62 S.Ct. 1000, 1005, 86 L.Ed. 1312 (Murphy, J., dissenting). '(A)fter an accused sustains the initial burden, imposed by Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin.'

32 We reach a contrary conclusion in Gilbert v. California, supra, as to the admissibility of the witness' testimony that he also identified the accused at the lineup.

33 Thus it is not the case that '(i)t matters not how well the witness knows the suspect, whether the witness is the suspect's mother, brother, or long-time associate, and no matter how long or well the witness observed the perpetrator at the scene of the crime.' Such factors will have an important bearing upon the true basis of the witness' in-court identification. Moreover, the State's inability to bolster the witness' courtroom identification by introduction of the lineup identification itself, see Gilbert v. California, supra, will become less significant the more the evidence of other opportunities of the witness to observe the defendant. Thus where the witness is a 'kidnap victim who has lived for days with his abductor' the value to the State of admission of the lineup identification is indeed marginal, and such identification would be a mere formality.

1 Yet in Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, the Court recognizes that improper police conduct in the identification process has not been so widespread as to justify full retroactivity for its new rule.

2 In Miranda v. State of Arizona, 384 U.S. 436, 449, 86 S.Ct. 1602, 1614, 16 L.Ed.2d 694, the Court noted that O'Hara, Fundamentals of Criminal Investigation (1956) is a text that has enjoyed extensive use among law enforcement agencies and among students of police science. The quality of the work was said to rest on the author's long service as observer, lecturer in police science, and work as a federal crime investigator. O'Hara does not suggest that the police should or do use identification machinery improperly; instead he argues for techniques that would increase the reliability of eyewitness identifications, and there is no reason to suggest that O'Hara's views are not shared and practiced by the majority of police departments throughout the land.

3 The instant case and its companions, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178, and Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199, certainly lend no support to the Court's assumptions. The police conduct deemed improper by the Court in the three cases seems to have come to light at trial in the ordinary course of events. One can ask what more counsel would have learned at the pretrial identifications that would have been relevant for truth determination at trial. When the Court premises its constitutional rule on police conduct so subtle as to defy description and subsequent disclosure it deals in pure speculation. If police conduct is intentionally veiled, the police will know about it, and I am unwilling to speculate that defense counsel at trial will be unable to reconstruct the known circumstances of the pretrial identification. And if the 'unknown' influence on identifications is 'innocent,' the Court's general premise evaporates and the problem is simply that of the inherent shortcomings of eyewitness testimony.

4 I would not have thought that the State's interest regarding its sources of identification is any less than its interest in protecting informants, especially those who may aid in identification but who will not be used as witnesses. See McCray v. Illinois, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62.

5 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314. See also Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Napue v.

Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737; Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690.

6 One point of view about the role of the courtroom lawyer appears in Frank, Courts on Trial 82—83. 'What is the role of the lawyers in bringing the evidence before the trial court? As you may learn by reading any one of a dozen or more handbooks on how to try a law-suit, an experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. * * * If such a witness happens to be timid, frightened by the unfamiliarity of court-room ways, the lawyer in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts. Longenecker, in his book Hints On the Trial of a Law Suit (a book endorsed by the great Wigmore) in writing of the 'truthful, honest, over-cautious' witness, tells how 'a skilful advocate by a rapid cross-examination may ruin the testimony of such a witness.' The author does not even hint any disapproval of that accomplishment. Longenecker's and other similar books recommend that a lawyer try to prod an irritable but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury. 'You may,' writes Harris, 'sometimes destroy the effect of an adverse witness by making him appear more hostile than he really is. You may make him exaggerate or unsay something and say it again.' Taft says that a clever cross-examiner, dealing with an honest but egotistic witness, will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him 'hang himself.' 'And thus,' adds Taft, 'it may happen that not only is the value of his testimony lost, but the side which produces him suffers for seeking aid from such a source'—although, I would add, that may be the only source of evidence of a fact on which the decision will turn.

"An intimidating manner in putting questions,' writes Wigmore, 'may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value."

7 See the materials collected in c. 3 of Countryman & Finman, The Lawyer in Modern Society; Joint Committee on Continuing Legal Education of American Law Institute and the American Bar Association, The Problem of a Criminal Defense 1—46 (1961); Stovall, Aspects of the Advocate's Dual Responsibility, 22 The Alabama Lawyer 66; Gold, Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer, 14 Clev.-Mar.L.Rev. 65; Symposium on Professional Ethics, 64 Mich.L.Rev. 1469—1498.

* While it is conceivable that legislation might provide a meticulous lineup procedure which would satisfy constitutional requirements, I do not agree with the Court that this would 'remove the basis for regarding the (lineup) stage as 'critical."

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698 F.3d 69
United States Court of Appeals,
Second Circuit.

Rudolph YOUNG, Petitioner–Appellee,

v.

James CONWAY, Respondent–Appellant.

Docket No. 11–830–pr.
|
Argued: May 23, 2012.
|
Decided: Oct. 16, 2012.

Synopsis

Background: Following affirmance of his convictions for robbery and burglary, 850 N.E.2d 623, the United States District Court for the Western District of New York, Victor E. Bianchini, United States Magistrate Judge, 761 F.Supp.2d 59, granted defendant's petition for a writ of habeas corpus, and state appealed.

Holdings: The Court of Appeals, Barrington D. Parker, Circuit Judge, held that:

victim's in-court identification of defendant did not have a basis independent of tainted lineup;

court would exercise it discretion not to consider state's argument that *Stone*barred habeas relief on petitioner's claim challenging admissibility of victim's in-court identification; and

admission of robbery victim's unreliable in-court identification had a "substantial and injurious" influence on the jury's deliberations.

Affirmed in part and vacated in part.

Attorneys and Law Firms

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James L. Brochin, Jennifer H. Wu, Cassius K. Sims, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Barry C. Scheck, David Loftis, Karen Newirth, Innocence Project, Inc., New York, NY, for Amicus Curiae the Innocence Project.

Before: B.D. PARKER, HALL, and CARNEY, Circuit Judges.

Opinion

BARRINGTON D. PARKER, Circuit Judge:

The State of New York appeals from a judgment of the United States District Court for the Western District of New York (Bianchini, *M.J.*) granting defendant Rudolph Young's petition for a writ of habeas corpus, vacating his convictions for robbery and burglary, and barring the State of New York from retrying him.[1] Young was convicted at his first trial in August 1993 based on the victim's in-court identification and her testimony that she had identified him in a lineup held one month after the crime. He was the only ***72** member of the lineup whose picture had also been included in a photographic array shown to the victim two days earlier, when she failed to make an identification. After the lineup identification testimony was suppressed as the product of Young's unconstitutional arrest under the Fourth Amendment,[2] at a second trial held almost six years later, the state trial court nonetheless permitted the victim to identify Young in court as the person who had broken into her home, based on its finding that her in-court identification had a basis independent of the tainted lineup. The New York courts affirmed Young's convictions on direct appeal. Young filed a petition for habeas corpus arguing, *inter alia,* that the source of the victim's in-court identification could not possibly have been independent of the tainted lineup. The district court agreed and granted the petition.

The State now appeals, arguing principally that, because Young had a full and fair opportunity to litigate his Fourth Amendment claim in state court, federal habeas relief is not available. *See Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Because the State failed to raise this non-jurisdictional argument in the district court, we decline in

the exercise of our discretion to consider it for the first time on appeal. We agree with the district court that the state courts' determination that the victim's in-court identification derived from a source independent of a tainted lineup constituted an unreasonable application of, and was contrary to, clearly established Supreme Court law. *See United States v. Crews,* 445 U.S. 463, 472–74, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980); *United States v. Wade,* 388 U.S. 218, 240–41, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Finally, although we conclude that the in-court identification substantially and injuriously influenced the jury's deliberations, and while we share the district court's "grave doubts whether th[e] circumstantial evidence was ... legally sufficient to convict Young" without it, *Young v. Conway,* 761 F.Supp.2d 59, 76 (W.D.N.Y.2011), such doubts must be resolved if at all by the state court, not ours. Accordingly, we vacate that portion of the district court's judgment barring the State from retrying Young, but affirm its vacatur of Young's convictions.

BACKGROUND

The crimes for which Young was convicted occurred on March 29, 1991. That evening, an intruder entered the home of William and Lisa Sykes carrying an axe and sledgehammer and wearing a blanket draped over his clothes. He wore a scarf around his mouth that covered his lips, nose, ears, and cheeks, leaving only his eyes and the top of his head uncovered. Brandishing the axe over Mr. Sykes's head, the intruder demanded money and then took some watches from the bedroom. The Sykeses later reported that a pair of binoculars, a red bicycle, a mirror, and a pair of workout gloves from Mrs. Sykes's car were also missing.

The intruder was in the house for approximately five to seven minutes. After he left, Mr. Sykes immediately called the police. In the police report taken later that evening, which she signed, Mrs. Sykes, who is white, described the intruder as "[a] black man in his twenties, five-ten, medium build." App. at 131.[3] When the ***73** police asked if she could assist in preparing a composite sketch of the intruder, Mrs. Sykes replied that she could not. *Id.*

Approximately one month later, police showed Mrs. Sykes a photographic array containing six full-color photographs, including one of Young's entire face. She could not at that time identify Young as the intruder.[4] The next day, Mr. Sykes viewed the same array in his home—with Mrs. Sykes present—but also failed to make an identification.

The next day, Young was arrested and placed in a lineup that Mr. and Mrs. Sykes viewed separately. As noted, the Appellate Division, Fourth Department, subsequently held that there was no probable cause for the arrest. *See Young,* 202 A.D.2d at 1026, 609 N.Y.S.2d at 726–27. Of the lineup participants, Young was the only person whose picture had been included in the photo array viewed by the Sykeses. The lineup participants—none of whom wore scarves around their faces or blankets over their bodies—each stepped forward and said three things that the intruder had allegedly said the night of the crime. Mr. Sykes did not identify Young. Instead, he said the voice of a different lineup participant sounded most like the intruder, while the eyes and face of yet another lineup participant most resembled him. Mrs. Sykes, however, identified Young based just on "his eyes and the voice." App. at 161.

Young was indicted for burglary and two counts of robbery and went to trial in August 1993. At trial, Mrs. Sykes identified Young as "that person that [she] identified at the lineup." 1993 Trial Tr. ("Trial I") 57. She later testified that she made this identification based on a "combination" of factors "from seeing him and also the voice." App. at 73. Due largely to Mrs. Sykes's in-court identification, which stemmed from the prior lineup, Young was convicted. *See* 761 F.Supp.2d at 77.

Young's conviction was reversed on appeal. The Appellate Division concluded that, because the police had obtained Young's consent to the lineup "by means affected by the primary taint [of his illegal arrest]," and because "the line-up identification flowed directly from the illegal arrest and was not attenuated therefrom," Mrs. Sykes's testimony concerning the lineup should not have been admitted at trial. *People v. Young,* 255 A.D.2d 905, 683 N.Y.S.2d 677, 678 (1998). The court ordered a new trial and provided the prosecution with an opportunity to prove that Mrs. Sykes had "a basis independent of the unlawful arrest and tainted identification procedure" to identify Young in court. *Id.*

In March 1999—eight years after the initial incident at the Sykeses' residence—the trial court held an independent source hearing to determine whether Mrs. Sykes would be permitted to make an in-court identification of Young at a re-trial. At that hearing, Mrs. Sykes described the robbery in detail and testified as to why she remembered the intruder from her observations of him during the crime rather than from the tainted lineup. According to her testimony, she first

encountered the intruder standing "a couple of feet" away from her in her well-lit dining room. App. at 117. Mrs. Sykes, who is "five-eight, fine-nine," testified that she was "[e]ssentially ... looking at [the intruder] face-to-face," and therefore estimated his relative height to be 5′10″. *Id.* Young is black, is six feet tall and was almost 34 at ***74** the time of the incident. Mrs. Sykes said the intruder had a "[s]carf over his face and a blanket covering all his clothes." *Id.* at 131. The scarf "covered up the intruder's mouth[,] chin," ears and the "majority of the intruder's cheeks and jawbone." *Id.* at 136–138. Mrs. Sykes did not recall whether the intruder had a beard or mustache, or the length or kind of hair on his head; whether he was muscular or had any "noticeable or distinct physical characteristics," *id.* at 138; whether he wore a hat or any jewelry; what type of shoes or pants he wore; whether he was wearing a jacket underneath the blanket; or whether he was wearing gloves.

After initially screaming, Mrs. Sykes said she looked carefully at the intruder, in disbelief that the incident was not a prank, but realized after staring at his eyes that she did not know him. The burglar then walked directly behind Mr. Sykes, brandished the axe over his head, looked directly at Mrs. Sykes, and said, "I will kill him. Give me your wallets." *Id.* at 118 (quotation marks omitted).

The three then walked down the hallway to the master bedroom to retrieve Mr. Sykes's wallet. Mrs. Sykes turned on the hall light and the intruder turned and looked right at her. She continued to watch him as he relieved Mr. Sykes of his money and took the watches. After next demanding that Mrs. Sykes give him her money, he proceeded to rip two telephones out of the walls, instructing Mrs. Sykes not to "look at [his] face." *Id.* at 123. The intruder left the house shortly thereafter.

Mrs. Sykes testified that, up until the point the intruder instructed her to avert her eyes, she had continuously looked at his face, primarily his eyes, trying to determine who he was. She said that for many nights after the crime, she woke up seeing the intruder's eyes in her nightmares. However, she also testified that there was "[n]othing unusual that stood out" about them. *Id.* at 140. She further acknowledged that she was unable to assist the police in sketching a composite drawing of the intruder's face and stated that, although she had examined the eyes of each of the faces in the photo array conducted a month after the incident, she was unable to select Young because "a photograph is not a real person" and the pictures in the array did not "look real" to her. *Id.* at 155.

As to the lineup, Mrs. Sykes testified that she selected Young based solely on his eyes and voice. She contended that, eight years after the incident, she could "completely excise that lineup from [her] mind" and make an in-person identification based solely on the "eyes and voice." *Id.* at 168. Based on this testimony, the court found that Mrs. Sykes had demonstrated the ability to make an in-court identification at Young's subsequent retrial. In so holding, the court stressed that Mrs. Sykes "was in close proximity" to the intruder and "had ample opportunity" to see him. *Id.* at 195. Although "much of her identification focused on [the intruder's] eyes," her certainty helped establish her ability to make an in-court identification. *Id.*

At Young's retrial in January 2000, the prosecution offered no physical evidence linking Young to the robbery. Instead, its case-in-chief consisted almost entirely of testimony from the Sykeses and from two other individuals, Taunja Isaac and Nell Kimbrel. The Sykeses' description of the robbery at trial was largely consistent with Mrs. Sykes's description at the independent source hearing. She identified Young as the perpetrator. Mr. Sykes did not identify him. The court denied Young's motion to introduce expert testimony on the ability of a person (1) to make an identification independent of an earlier, ***75** tainted lineup identification or (2) generally to make an accurate identification given various factors.

The prosecution's third primary witness, Isaac, was an acquaintance of Young's and a convicted felon with a lengthy criminal record. Isaac testified that on April 29th—a month after the Sykes burglary and in connection with Isaac's arrest for disorderly conduct—she informed the police about a pair of binoculars and three watches that Young had "asked [her] to sell" some time in March or April of 1991. 2000 Trial Tr. ("Trial II") 131. When asked by a sheriff's investigator to retrieve the items, Isaac was able to recover only the binoculars, which were introduced into evidence. Mr. Sykes identified them as those stolen from his car. A sheriff's investigator testified that he never directed Isaac to show him where or from whom she had gotten them.

Isaac admitted at trial that she "had a very good and close friendship" with Lamont Gordon, another man who "lived around [her] neighborhood" and whom she knew the police to be investigating as a suspect in the Sykes robbery. *Id.* at 149–150. Gordon was a "[l]ight skinned" African–American male, "about six feet," of "medium build," and "between 18 and 20" at the time of the incident. *Id.* at 159. Isaac further

testified that at the time of her arrest she feared she would be charged and sent to jail. She never was.

The fourth primary prosecution witness, Kimbrel, testified that a month after the incident the police found a pair of gloves belonging to the Sykeses in a garbage can at her residence—a house from which as many as 30 people a night would "be in and out" to "smoke cocaine." *Id.* at 272–73. Isaac, from whom Kimbrel regularly bought cocaine, and Young were two such people. According to Kimbrel's testimony, Young had been staying at her house at least once a week and leaving some of his belongings there during the months of March and April 1991, during which time Kimbrel was "constantly [and] continually" using cocaine. *Id.* at 286. Kimbrel, who had prior felony convictions for larceny and possession of stolen property, could say only that the gloves "had been [in her house] for a while" and that she had never actually seen Young with the gloves. *Id.* at 261. She testified that "[a]t any point someone could have brought the gloves in [to her house] because [she] had a lot of peoples in the house." *Id.* at 274. Kimbrel had discarded the gloves, which were admitted at trial, along with a number of other items upon learning that the police were coming to execute a search warrant.

The defense introduced the testimony of a police officer establishing that Young was 6′0″ to 6′1″ tall and would have been 34 years old at the time of the incident.

Young was convicted on all three counts and sentenced to two consecutive terms of fifteen years to life imprisonment.

Direct Appeal

The Appellate Division, Fourth Department, affirmed the convictions. *People v. Young,* 20 A.D.3d 893, 798 N.Y.S.2d 625, 625–26 (2005). Addressing Young's challenge to Mrs. Sykes's in-court identification, a majority of the five-justice panel held that the trial court had "properly determined that the People proved by clear and convincing evidence that the victim had an independent basis for her in-court identification" of Young. *Id.* at 625–26. Two justices dissented on the grounds that

> [t]he inability of the victim to assist the police in constructing a composite of the intruder and her inability to select defendant from a photo array prior to the lineup identification procedure strongly suggest that her alleged independent ***76** "recollection" of defendant was irrevocably tainted by her having viewed defendant in the lineup and having heard him speak. We therefore must conclude that any in-court identification testimony by the victim would be derived from exploitation of the illegal arrest.

Id. at 627 (Hurlbutt, *J.P.,* and Gorski, *J.,* dissenting) (quotation marks and citations omitted).

A divided panel of the Court of Appeals affirmed. *People v. Young,* 7 N.Y.3d 40, 46, 817 N.Y.S.2d 576, 850 N.E.2d 623 (2006). The majority declined to "disturb[ ]" the lower courts' determination that there was an independent basis for Mrs. Sykes's identification testimony, an "issue of fact" for which it found "support in the record." *Id.* at 44, 817 N.Y.S.2d 576, 850 N.E.2d 623. A dissenting judge concluded that "any in-court identification [was] impermissible as a matter of law." *Id.* at 48, 817 N.Y.S.2d 576, 850 N.E.2d 623 (G.B. Smith, *J.,* dissenting).[5]

Proceedings Below

Young timely filed a petition for a writ of habeas corpus alleging, *inter alia,* that the state courts' conclusion that Mrs. Sykes had an independent source for her in-court identification of Young was an unreasonable application of clearly established federal law. *See Wade,* 388 U.S. at 241, 87 S.Ct. 1926 (listing six factors courts should consider to determine whether witness has independent basis for in-court identification); *see also Crews,* 445 U.S. at 472–73 & n. 18, 100 S.Ct. 1244. The State opposed Young's petition on the merits, but never argued, as it does on appeal, that *Stone* barred consideration of Young's claim.

After "[r]eviewing the *Wade* factors," the district court concluded that "all of them are on Petitioner's side of the scale, and none of them are on the government's." 761 F.Supp.2d at 75. Accordingly, the district court found the New York courts' determination that Mrs. Sykes's in-court identification stemmed from an "independent source" to be an unreasonable application of *Wade. Id.* at 76. Left with "no doubt ... that the [trial court's] error [in admitting the identification testimony] influenced the jury's deliberations in a way that was substantial and injurious," the court ordered Young's convictions vacated. *Id.* at 77 (quotation marks and citations omitted). Finally, because it believed "the prosecution would not be able to secure a conviction based upon legally sufficient evidence so as to satisfy due process concerns," the court also ordered "the extraordinary remedy of precluding the prosecution from retrying Young on the charges stemming from the Sykes home invasion." *Id.* at 83. This appeal followed.

We review a district court's grant of habeas relief *de novo,* and the underlying findings of fact for clear error. *See Ramchair v. Conway,* 601 F.3d 66, 72 (2d Cir.2010).

DISCUSSION

The State presents scant argument on appeal challenging the district court's conclusion that the state court unreasonably applied *Wade.* Its principal contention is that, because Young had a full and fair opportunity to litigate his "Fourth Amendment claim" in state court, federal habeas corpus provides him no remedy. *See Stone,* 428 U.S. at 494, 96 S.Ct. 3037. Because ***77** the State failed to raise this non-jurisdictional argument below, we decline to consider it. *See infra* Part II. We further hold that the district court properly concluded that the state courts' determination, that Mrs. Sykes's testimony was properly admitted as having a source independent of the tainted lineup, constituted an unreasonable application of, and was contrary to, clearly established Supreme Court law, *see Crews,* 445 U.S. at 472–74, 100 S.Ct. 1244; *Wade,* 388 U.S. at 241, 87 S.Ct. 1926. *See infra* Part I. Finally, we hold that the in-court identification substantially and injuriously influenced the jury's deliberations, warranting vacatur of Young's convictions. *See infra* Part III.

I.

Whether an in-court identification has a source independent of an earlier tainted identification is a mixed question of law and fact. *See Wade,* 388 U.S. at 241–42, 87 S.Ct. 1926. "On federal habeas review, mixed questions of law and fact translate to 'mixed constitutional questions (*i.e.,* application of constitutional law to fact).' " *Overton v. Newton,* 295 F.3d 270, 277 (2d Cir.2002) (quoting *Williams v. Taylor,* 529 U.S. 362, 400, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (O'Connor, *J.,* concurring)). Under the Anti–Terrorism and Effective Death Penalty Act of 1996 (AEDPA), such questions "are subject to the standard set forth in 28 U.S.C. § 2254(d)(1), which requires the habeas court to determine whether the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' " *Id.* (quoting 28 U.S.C. § 2254(d)(1)).

The exclusionary rule applies not only to the "direct products" of unconstitutional invasions of defendants' Fourth Amendment rights, but also to the indirect or derivative "fruits" of those invasions. *Crews,* 445 U.S. at 470, 100 S.Ct. 1244 (quotation marks and citations omitted) (citing *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Whether such fruit is "of the poisonous tree"—in which case it must be excluded at trial—depends on "whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the taint imposed upon that evidence by the original illegality." *Id.* at 471, 83 S.Ct. 407 (quotation marks and citations omitted). In the case of unconstitutional arrests, any of three distinct elements of in-court identifications may "ha[ve] been come at by exploitation of the violation of the defendant's Fourth Amendment rights": (1) the victim's presence at trial to identify the defendant; (2) the defendant's presence at trial so that he can be identified; and (3) the victim's "knowledge of and [ ] ability to reconstruct the prior criminal occurrence and to identify the defendant from her observations of him at the time of the crime." *Id.* (quotation marks and citations omitted).

As to the third element, "given the vagaries of human memory and the inherent suggestibility of many identification procedures," "intervening photographic and lineup identifications—both of which are conceded to be suppressible fruits of the Fourth Amendment violation—[may] affect the reliability of the in-court identification and render it inadmissible as well." *Id.* at 472, 83 S.Ct. 407 (citing Patrick M. Wall, *Eye–Witness Identification in Criminal Cases* 40–64 (1965); Frederic D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification,* 29 Stan. L.Rev. 969, 974–89 (1977)).

> ***78** [I]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.

Wade, 388 U.S. at 229, 87 S.Ct. 1926 (quotation marks and citations omitted) (citing Glanville Williams & H.A. Hammelmann, *Identification Parades, Part I,* Crim. L.Rev. 479, 482 (1963)). Indeed, social science research indicates that false identification rates increase, and accuracy on the whole decreases, when there are multiple identification procedures. *E.g.,* Ryan D. Godfrey & Steven E. Clark, *Repeated Eyewitness Identification Procedures: Memory, Decision Making, and Probative Value,* 34 Law & Hum.

Behav. 241, 241, 256 (2010) (explaining this effect as the result either of "misplaced familiarity due to the memory of the suspect" from earlier identification or of "heightened expectations and suggestiveness").

Whether an in-court identification is nevertheless admissible depends on whether it has an origin "independent" of the tainted lineup, *Wade,* 388 U.S. at 242, 87 S.Ct. 1926—whether it "rested on an independent recollection of [the victim's] initial encounter with the assailant, uninfluenced by the pretrial identifications," *Crews,* 445 U.S. at 473, 100 S.Ct. 1244. In answering that question, courts consider the following factors: (1) the victim's prior opportunity to observe the alleged criminal act; (2) any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to the lineup of another person; (4) a photographic identification of the defendant prior to the illegal lineup; (5) the victim's failure to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the lineup identification.[6] *Wade,* 388 U.S. at 241, 87 S.Ct. 1926; *see also Crews,* 445 U.S. at 473 nn. 18–19, 100 S.Ct. 1244 (citing with approval and applying *Wade* factors "in the context of [a] Fourth Amendment violation" to determine whether in-court identification had origins independent of earlier identification tainted by arrest lacking probable cause (quotation marks omitted)). It "is also relevant" to consider facts "disclosed concerning the conduct of the lineup." *Wade,* 388 U.S. at 241, 87 S.Ct. 1926. The State bears the burden of proving, by clear and convincing evidence, that the in-court identification was "based upon observations of the suspect other than the [tainted] lineup identification." *Id.* at 240, 87 S.Ct. 1926.

We turn now to an analysis of Mrs. Sykes's in-court identification, considering whether the *Wade* factors could reasonably support a finding by clear and convincing evidence that it had an independent basis. In the course of assessing those factors, we reference an extensive body of scientific literature presented to us by *amicus curiae* the Innocence Project in support of affirmance.[7] That literature indicates ***79** that certain circumstances surrounding a crime —including the perpetrator's wearing a disguise, the presence of a weapon, the stress of the situation, the cross-racial nature of the crime, the passage of time between observation and identification, and the witness's exposure to defendant through multiple identification procedures—may impair the ability of a witness, such as Mrs. Sykes, to accurately process what she observed. Many of these factors are counterintuitive and, therefore, not coterminous with "common sense." We note that the research presented to us by the Innocence Project —to which the State has offered no response[8]—has been reviewed, replicated, and retested, and is generally accepted in the research community. *See State v. Henderson,* 208 N.J. 208, 283, 27 A.3d 872 (2011) (reviewing comprehensive 86–page report of court-appointed Special Master based on seven experts' testimony and hundreds of scientific studies, including many of those cited by the Innocence Project and by us below; referring to such research as "the gold standard in terms of the applicability of social science research to the law" (quotation marks and citations omitted)). As a result, as the New Jersey Supreme Court has pointed out, "social scientists, forensic experts, law enforcement agencies, law reform groups, legislatures and courts" routinely rely upon the research during legal proceedings regarding eyewitness testimony. Report of the Special Master at 73, *Henderson,* 208 N.J. 208, 27 A.3d 872.[9]

Indeed, this Court has previously approved lower courts' drawing upon this body of literature in appropriate cases. In *United States v. Luis,* for example, we endorsed a "flexible approach" to trial judges' use of "a specific eyewitness charge in order to ameliorate the concerns expressed in ... [*Wade*] relating to the dangers inherent in eyewitness testimony that may lead to misidentification." 835 F.2d 37, 41 (2d Cir.1987); *see also United States v. Serna,* 799 F.2d 842, 850 (2d Cir.1986) (noting our "full [ ] aware[ness] of the dangers of testimony based purely on eyewitness identification," dangers on which we have "often commented"), *abrogated on other grounds by, United States v. DiNapoli,* 8 F.3d 909, 914 n. 5 (2d Cir.1993). In *United States v. Veal*, we affirmed the district court's exclusion of expert testimony on eyewitness identification in favor of "a very detailed instruction to the jury regarding the evaluation of eyewitness identification evidence," observing that district courts "may properly address the dangers of unreliable eyewitness identification testimony by giving a jury charge appropriate to the circumstances ***80** of the case." No. 98–1539, 1999 WL 446783, at *1 (2d Cir. June 16, 1999) (citing *Luis,* 835 F.2d at 41). Trial courts should continue to draw upon this literature to the extent they deem it helpful in fashioning such charges. That said, we caution that much eyewitness identification testimony is reliable and is, and should be, routinely accepted by juries. *See, e.g., Luis,* 835 F.2d at 42 (finding no abuse of discretion in district court's refusal to give defense counsel's requested eyewitness identification charge in part because "[t]he [ ] circumstances provide strong indicia that the identification of [defendant]

as a participant in the crime for which he was charged was reliable").

* * *

The first and, we think, most important *Wade* factor concerns the victim's prior opportunity to observe the alleged criminal act. Here, Mrs. Sykes testified that she observed the perpetrator for five to seven minutes in good lighting. However, she was afforded no meaningful opportunity to perceive him during that time given that his body was covered with a blanket and the entirety of his face below his eyes —including his lips, nose, ears, and cheeks—was covered by a scarf. And as for those eyes, "*nothing unusual ... stood out* " about them. App. at 140 (emphasis added). Nor did the intruder have any other "noticeable or distinct physical characteristics." *Id.* at 138. Indeed, following the incident, Mrs. Sykes could neither assist in a composite sketch nor recall any details of the perpetrator's mouth, ears, forehead, facial hair, or hairstyle. Since then, she has been unable to articulate anything but the barest of details about him—his height, gender, and race—instead repeatedly emphasizing his wholly unremarkable and decontextualized eyes. In *Raheem v. Kelly,* 257 F.3d 122, 138 (2d Cir.2001), this Court found a witness's testimony at a hearing insufficient to establish an independent basis for his in-court identification of an alleged shooter, where the witness described the shooter's eyes as "weird" and "different" because of the shooter's "glare" and the manner in which he "fixed his eyes"; there was "something about it that stood out." *Id.* at 139. Here, Mrs. Sykes offered an even flimsier description and admitted that nothing unusual stood out about the perpetrator's eyes. Thus we are not persuaded that her observation of them could serve as an independent basis for her in-court identification.

In assessing this first *Wade* factor, we find illuminating the social science research, presented by the Innocence Project, addressing the effect of disguises, weapons, stress, and cross-racial identifications on those identifications' accuracy. First, as the *amicus curiae* observes, even "subtle disguises can ... impair identification accuracy." Brian L. Cutler & Margaret Bull Kovera, *Evaluating Eyewitness Identification* 43 (2010); *see also* Brian L. Cutler et al., *The Reliability of Eyewitness Identification: The Role of System and Estimator Variables,* 11 Law & Hum. Behav. 233, 240, 244–45 (1987) (reporting results of experiment showing that when "perpetrator" wore a hat, only 27% of participants' identifications were accurate, versus 45% when "perpetrator" did not wear a hat). Here, the perpetrator of the Sykes robbery wore no minimal disguise; as noted above, his body and face were almost entirely covered. That disguise deprived Mrs. Sykes of any meaningful opportunity to observe him; social science research suggests it likely also impaired her ability accurately to perceive the little she was able to observe.

Second, the scientific literature indicates that the presence of a weapon during a crime "will draw central attention, thus decreasing the ability of the eyewitness to ***81** adequately encode and later recall peripheral details." Nancy Mehrkens Steblay, *A Meta–Analytic Review of the Weapon Focus Effect,* 16 Law & Hum. Behav. 413, 414 (1992). For example, an analysis of 19 weapon-focus studies involving 2082 identifications found that, on average, identification accuracy decreased approximately 10% when a weapon was present. *Id.* at 415–17. Our own Court has recognized that "it is human nature for a person toward whom a [weapon] is being pointed to focus h[er] attention more on the [weapon] than on the face of the person pointing it." *Raheem,* 257 F.3d at 138. Here, the perpetrator entered the Sykeses' home wielding an axe and a sledgehammer. Mrs. Sykes "observed" him while he brandished the axe over the head of her wheelchair-bound husband, threatening to kill him.

Third, high levels of stress have been shown to induce a defensive mental state that can result in a diminished ability accurately to process and recall events, leading to inaccurate identifications. Kenneth A. Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory,* 28 Law & Hum. Behav. 687, 687, 699–700 (2004); *see also* Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress,* 27 Int'l J.L. & Psychiatry 265 (2004). For example, a review of 16 studies involving 1727 participants found that accurate identifications decreased 22.2% under high stress conditions. Deffenbacher et al., *A Meta–Analytic Review of the Effects of High Stress on Eyewitness Memory* at 692, 694 (reporting that overall proportion of correct identifications for high stress conditions was 0.42 versus 0.54 for low stress conditions). Here, as if the stress of the situation were not already clear, Mrs. Sykes testified that she was "scared" and "petrified." App. at 142.

Fourth, social science research indicates that people are significantly more prone to identification errors when trying to identify someone of a different race, a phenomenon known as "own-race bias." "There is a considerable consistency across [scientific] studies, indicating that memory for own-race faces is superior to memory for other-race faces." Robert

K. Bothwell et al., *Cross–Racial Identification,* 15 Personality & Soc. Psychol. Bull. 19, 19, 23 (1989) (conducting meta-analysis of 14 studies finding that own-race bias effect "occurs for both Black and White subjects in 79% of the samples"). Studies have thus found a "tendency for people to exhibit better memory for faces of [members of their own race] than for faces of [members of another race]." Tara Anthony et al., *Cross–Racial Facial Identification: A Social Cognitive Integration,* 18 Personality & Soc. Psychol. Bull. 296, 299 (1992). Studies suggest that own-race bias is especially pronounced where, as here, the person making the identification is Caucasian and the person being identified is African–American. Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony,* 2 Fed. Cts. L.Rev. 1, 14 (2007).

Before proceeding to the second *Wade* factor, we also consider the flip-side of the first one: whether Mrs. Sykes's limited opportunity to observe the perpetrator at the crime scene influenced her subsequent *perceived ability* to identify Young, and whether those subsequent identifications in turn altered her *perceived ability* to draw on her limited observation of Young at the crime scene. After all, as we have seen, the in-court identification followed *three* instances in which Mrs. Sykes was exposed to the defendant subsequent to the crime: she viewed his picture in the photo array and his person both in the unconstitutional lineup and also during the ***82** first trial. Here, the Innocence Project has directed us to scientific research indicating that such prior identifications may taint subsequent in-court identifications due to a phenomenon known as the "mugshot exposure effect," or "unconscious transference," whereby a witness selects a person in a later identification procedure based on a sense of familiarity deriving from her exposure to him during a prior one. This phenomenon occurs because "the witness [is] unable to partition his or her memory in such a way as to know that the suspect's increased familiarity is due to the exposure [in the photo array], rather than the suspect's presence at the time of the crime." Godfrey & Clark, at 242; *see also People v. Santiago,* 17 N.Y.3d 661, 673, 934 N.Y.S.2d 746, 958 N.E.2d 874 (2011) (recognizing unconscious transference); *Henderson,* 208 N.J. at 255 ("[S]uccessive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure."). This phenomenon is especially pronounced where, as here, the witness initially makes no identification from a photo array, but then selects someone whose picture was included in the photo array during a later identification procedure. Godfrey & Clark, at 247. For example, an analysis of 17 experiments showed that while only 15% of witnesses made an incorrect identification when the suspects in the lineup were viewed for the first time in the lineup, 37% of the witnesses made an incorrect identification when they had seen a suspect in a prior mugshot. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference,* 30 Law & Hum. Behav. 287, 299 (2006).

In addition, where, as here, a victim identifies the defendant during an identification procedure prior to her in-court identification, her memory can be tainted by the "mugshot commitment effect": having identified that person as the perpetrator, she becomes attached to her prior identification. As a result, she is more likely to identify him again in a subsequent identification procedure, even if he is innocent. *See* Charles A. Goodsell et al., *Effects of Mugshot Commitment on Lineup Performance in Young and Older Adults,* 23 Applied Cognitive Psychol. 788, 789 (2009). In one study, 72% of persons who made an inaccurate identification from a mugshot book later made the same mistaken identification in a lineup. *Id.* at 795. This phenomenon may be observed even when *the actual culprit is present* in the second identification procedure, and the previously selected innocent person is absent. For example, in one experiment, 60% of participants indicated that the actual culprit was not present in the lineup, while only 12% correctly identified him from the lineup. *Id.* at 798. This research demonstrates that "[m]ugshot choosers will select their prior mugshot choice if given the opportunity and will reject a lineup that does not contain it" even when the opportunity to select the actual culprit is available. *Id.* Moreover, where a witness has been primed with information supporting an erroneous identification—such as repeated exposure to Mr. Young's face in photographs, the illegal lineup, and the 1993 trial—research suggests she is often more confident in her erroneous selection. *See* Elizabeth Loftus, *Semantic Integration of Verbal Information into a Visual Memory,* 4 J. Experimental Psych.: Hum. Learning And Memory 19–31 (1978).

Here, our analysis of Mrs. Sykes's ability to identify Young independent of the tainted lineup is also informed by the possibility that her in-court identification was due to her prior choice of Young during ***83** the illegal lineup, which in turn may likely have been due to her prior exposure to his picture in the photo array. Combined with Mrs. Sykes's minimal opportunity to observe the perpetrator during the

commission of a stressful, violence-threatening, cross-racial crime, Mrs. Sykes's multiple exposures to and identifications of Young thereafter strongly suggests that there could be no independent basis for Mrs. Sykes's identification. Nevertheless, we examine the remaining *Wade* factors.

* * *

The second *Wade* factor is the existence of any discrepancy between any pre-lineup description and the defendant's actual description. Immediately after the robbery, Mrs. Sykes described the perpetrator as "[a] black man in his twenties, five-ten, medium build," App. at 131; Young, by contrast, is a six-foot tall African–American who, at the time of the robbery, was almost 34 years old. The two-inch height differential between Mrs. Sykes's estimated and Young's actual height is significant for at least two reasons: first, the difference between 5′10″ and six feet is the difference between a man of average height and a tall man. *See* Cynthia L. Ogden, et al., *Centers for Disease Control, Mean Body Weight, Height, and Body Mass Index, United States, 1960–2002* (2004) at 15, available at http://www.cdc.gov/nchs/data/ad/ad347.pdf. Second, and more important, Mrs. Sykes estimated the perpetrator's height in relative terms—in relation to her own height of 5′8″ or 5′9″—based on her ability essentially to stand "face-to-face" with him. If Young was the perpetrator, there would have been a three-to four-inch height differential between them, rendering a description of their encounter as "face-to-face" unlikely. Even leaving aside the divergence of Mrs. Sykes's description from Young's actual appearance, Mrs. Sykes's post-incident description does not "instill any confidence as to the reliability of [her] identification[ ] of [Young] as the [robber] independently of the [tainted lineup], for though [she] provided general information as to the [robber's] age, height, and weight, [she] provided virtually no detail about his face." *Raheem,* 257 F.3d at 138. Therefore, this factor also weighs against the State.

* * *

The third, fourth, and fifth *Wade* factors probe whether the witness, prior to the lineup, identified another person; whether the witness identified the defendant by photograph prior to the lineup; and whether the witness failed to identify the defendant on a prior occasion. Here, Mrs. Sykes has offered differing testimony as to whether, from the photo array conducted one month after the crime, she selected someone other than Young as the perpetrator or failed to identify anyone at all. Either way, her inability to identify Young goes to the third through fifth *Wade* factors and, for each, counsels against concluding that Mrs. Sykes had an independent basis for her in-court identification of Young. In *Crews,* by contrast—where the in-court identification was found to have an independent basis—the "the victim failed to identify anyone other than respondent, ... [and] twice selected respondent without hesitation in nonsuggestive pretrial identification procedures." 445 U.S. at 473 n. 18, 100 S.Ct. 1244.

Moreover, as noted above, Mrs. Sykes's failure to identify Young in the photo array, followed by her "successful" identification of him at the lineup, not only suggests that the robbery itself may have provided an inadequate basis for her in-court identification; but in light of the fact that Young was the *only* lineup participant whose picture was also included in the photo array, it also suggests that the photo array *itself* may have been the only basis for the very ***84** lineup identification suppressed as the fruit of Young's unlawful arrest.

* * *

The sixth and final *Wade* factor is "the lapse of time between the alleged act and the lineup identification." *Wade,* 388 U.S. at 241, 87 S.Ct. 1926. As the *amicus curiae* observes, research indicates that the passage of time both degrades correct memories and heightens confidence in incorrect ones. *See* Kenneth A. Deffenbacher et al., *Forgetting the Once–Seen Face: Estimating the Strength of an Eyewitness's Memory Representation,* 14 J. Experimental Psychol.: Applied 139, 147–48 (2008). The Supreme Court has stated that a delay of seven months between a crime and a pre-trial identification is "a seriously negative factor" weighing against independent reliability "in most cases." *Neil,* 409 U.S. at 201, 93 S.Ct. 375. According to studies, even a one-week delay can cause the "typical eyewitness viewing a perpetrator's face that [is] not highly distinctive ... to have no more than a 50% chance of being correct in his or her lineup identification." Deffenbacher et al., *Forgetting,* at 147.

Here, over one month passed between the robbery and Mrs. Sykes's identification of Young at the suppressed lineup. Early in this intervening one month—a not inconsiderable period of time—Mrs. Sykes failed to identify him (or worse, identified someone else) while being shown his photograph only one week after the alleged act. Leaving the photo array aside for the moment, the month-long delay between the robbery and confrontation weighs in favor of the accused when the circumstances of the crime and the prior description

given by the witness indicate nothing distinctive about the alleged perpetrator or about the witness's ability to perceive anything distinctive about him. There is no basis in the record to conclude that the reliability of Mrs. Sykes's identification somehow strengthened over the course of this month, or that she remembered details she had forgotten during the first photo array. The same is true of the year that passed between the robbery and her identification of Young at his first trial and the eight years separating the robbery from the independent source hearing. *See Raheem,* 257 F.3d at 139 (concluding that length of time between crime and confrontation did not suggest reliability where witnesses made wrong identifications of gunman from photo array conducted less than one week after event, three weeks passed between crime and their selection of defendant at improper lineup, and more than five years passed between crime and in-court identification, during which time this Court "[saw] nothing to suggest that those witnesses' identifications of [defendant] became more reliable").

Finally, we note that using the suppressed lineup as the second end-point makes sense only when the lineup is "nonsuggestive." *Crews,* 445 U.S. at 473 n. 18, 100 S.Ct. 1244; *see also Wade,* 388 U.S. at 241, 87 S.Ct. 1926 (directing courts to consider facts disclosed "concerning the conduct of the lineup"). But here, as we observed earlier, Mrs. Sykes may have been influenced by her exposure to Young's photograph in the photo array. For all of these reasons, the sixth factor weighs significantly in favor of the petitioner.

* * *

Because all six *Wade* factors weigh against a finding that Mrs. Sykes's in-court identification could derive from a source other than the tainted lineup, the State failed to meet its burden to prove an independent basis by clear and convincing evidence. The Court of Appeals' determination otherwise was based on its mistaken impression that the independent source ***85** inquiry was an "issue of fact" to be resolved by the trial court and upheld on appeal so long as there was "support in the record." *Young,* 7 N.Y.3d at 44, 817 N.Y.S.2d 576, 850 N.E.2d 623. Thus, not only did the Court of Appeals apply the wrong legal standard, but also its conclusion constituted an unreasonable application of the correct standard (*Crews* and *Wade*) to the facts of this particular case. *Bell,* 535 U.S. at 694, 122 S.Ct. 1843. Its conclusion was therefore both contrary to, and an unreasonable application of, Supreme Court law. *Id.*

II.

The State's primary argument on appeal is that we are barred by *Stone* from considering Young's claim and, notwithstanding the State's failure to raise the issue below, we should consider it on appeal. We hold that, because the *Stone* rule is non-jurisdictional, it is waivable by the State, and we decline in the exercise of our discretion to consider it on appeal.

In *Stone,* the Supreme Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494, 96 S.Ct. 3037. The Court grounded its holding in the fact that the exclusionary rule is merely "a judicially created means of effectuating the rights secured by the Fourth Amendment"—not a constitutional right personal to the defendant. *Id.* at 482, 96 S.Ct. 3037. Because "in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration," habeas relief is unavailable unless the defendant was denied an opportunity for full and fair litigation in state court. *Id.* at 491 n. 31, 96 S.Ct. 3037.

However, the Supreme Court has made it clear that *Stone*'s limitation on federal habeas relief is not jurisdictional. *Withrow v. Williams,* 507 U.S. 680, 686, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (collecting cases discussing *Stone* as prudential and equitable rather than jurisdictional in nature). It is well-settled that non-jurisdictional arguments and defenses may be waived, and that we have the discretion—but are not required—to consider them on appeal. *E.g., Gonzalez v. Thaler,* —— U.S. ——, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012); *Bowles v. Russell,* 551 U.S. 205, 216–17, 127 S.Ct. 2360, 168 L.Ed.2d 96 (2007) (Souter, *J.,* dissenting); *Sharkey v. Quarantillo,* 541 F.3d 75, 88 (2d Cir.2008).

The State nonetheless contends that *Stone* is jurisdictional because it "made [habeas] relief categorically unavailable by collateral review." Resp.'s Reply Br. 3. There is no merit to this contention; *Stone* itself refutes it. In responding to Justice Brennan's dissent that *Stone* "la [id] the groundwork for a 'drastic withdrawal of federal habeas jurisdiction,' " the *Stone* majority explained that it held

> only that a federal court *need not* apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. *Our decision does not mean that the federal court lacks jurisdiction over such a claim.*

428 U.S. at 494 n. 37, 96 S.Ct. 3037 (quoting *id.* at 517, 96 S.Ct. 3037 (Brennan, *J.,* ***86** dissenting)) (emphasis added).[10] Indeed, the Supreme Court has held, in the highly analogous circumstances in which a state fails to assert procedural default, exhaustion, or non-retroactivity under *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), in opposition to habeas petitions—none of which is jurisdictional—that the courts of appeal have the discretion, but are by no means required, to address those defenses for the first time on appeal.[11]

Here, despite four years and numerous opportunities to do so, the State never raised *Stone* and the record is bereft of any reason as to why it failed to do so. *See Boardman v. Estelle,* 957 F.2d 1523, 1537 (9th Cir.1992) ("The Supreme Court has enforced strict procedural forfeitures on habeas petitioners in the interests of efficient and final adjudication. Why should not the state be similarly held to a pedestrian rule of appellate procedure? Concerns of federalism and respect for a state's criminal judgments are marginal here because the state brought the problem on itself."). Moreover, indulging that argument would require a remand to afford Young the opportunity to argue either why *Stone* does not apply or why he did not have a full and fair opportunity to litigate his claim. On a petition that has been pending for over five years, that would constitute an unjustifiable waste of scarce judicial resources, undermining the comity and federalism concerns that also underlie *Stone. See Withrow,* 507 U.S. at 686–87, 113 S.Ct. 1745 (citing *Stone,* 428 U.S. at 491 n. 31, 96 S.Ct. 3037); *cf. Agard v. Portuondo,* 159 F.3d 98, 100 (2d Cir.1998) ("*Teague* itself is driven in part by ***87** ... comity[,] [b]ut comity also calls for representatives of states not to agree to federal courts['] expending substantial time in addressing the merits of a case, only to argue belatedly that the merits should not have been reached."), *rev'd on other grounds,* 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

What is more, it is difficult to imagine a case further afield from the "typical Fourth Amendment claim, asserted on collateral attack" than this one, where the issue Young is "asking society to redetermine" has *everything* to do with "the basic justice of his incarceration." *Stone,* 428 U.S. at 491 n. 31, 96 S.Ct. 3037. At issue is the admission of evidence that, in this case, lacks the typical indicia of reliability that ordinarily weigh against re-litigating a Fourth Amendment claim on collateral review. *See Stone,* 428 U.S. at 490, 96 S.Ct. 3037 (observing that "ordinarily the evidence [sought to be suppressed] ... establishes beyond virtually any shadow of a doubt that the defendant is guilty" (quotation marks and citations omitted)). It also requires vacatur of his convictions. *See infra,* Part III. For all of these reasons, we exercise our discretion not to consider the State's argument that *Stone* bars habeas relief here.

III.

We turn now to the question of whether Young was prejudiced by the improper admission of Mrs. Sykes's identification testimony. When, as here, there is no state court holding to which AEDPA deference applies, a federal court in habeas must determine whether a state court's error in admitting identification testimony had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *see also Fry v. Pliler,* 551 U.S. 112, 121, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007). "The principal factors to be considered ... are the importance of the witness's wrongly admitted testimony and the overall strength of the prosecution's case." *Raheem,* 257 F.3d at 142 (quotation marks and citations omitted). In assessing importance, we consider whether the testimony bore on an issue that was critical to the jury's decision; whether it was material to the establishment of the critical fact or whether it was instead corroborated and cumulative; and whether the wrongly admitted evidence was emphasized in arguments to the jury. *Id.* (citing *Wray v. Johnson,* 202 F.3d 515, 526 (2d Cir.2000)).

Here, Mrs. Sykes's identification testimony clearly bore on an essential and critical issue: the identity of the robber. Her testimony was also crucial to the prosecution's case. The only other evidence tying Young to the robbery was Isaac's testimony that the items found in her home, matching the description of items stolen from the Sykeses' house, were given to her by Young to sell. Leaving aside the question of whether Isaac's testimony may have been influenced by a desire to protect Gordon—a close acquaintance whom she knew also to be a suspect in the Sykes robbery (and who better matched Mrs. Sykes's physical description of the perpetrator)—Isaac provided no insight into how Young acquired those items to begin with. Meanwhile, Kimbrel could not link the

gloves found at her residence—from which as many as 30 people came and went on a nightly basis—to Young, and the state offered no physical evidence that would have identified Young as the robber.

On these facts, we have little difficulty concluding that the admission of the unreliable in-court identification had a "substantial and injurious" influence on the jury's deliberations. Here, we again find illuminating research presented by the Innocence ***88** Project, indicating that identification evidence is "comparable to or more impactive than physical evidence ... and even sometimes [than] confession evidence." Melissa Boyce et al., *Belief of Eyewitness Identification Evidence, in* 2 Handbook of Eyewitness Psychology: Memory for People 501, 505 (R.C.L. Lindsay et al. eds., 2007). Moreover, "[t]he existence of eyewitness identification evidence increases the perceived strength of the other evidence presented." Boyce, at 505.

Studies also suggest that jurors tend to overestimate "the likely accuracy of eyewitness evidence," John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications,* 7 Law & Hum. Behav. 19, 28 (1983), perhaps because they "rely heavily on eyewitness factors that are *not* good indicators of accuracy," Tanja Rapus Benton et al., *Has Eyewitness Testimony Research Penetrated the American Legal System?: A Synthesis of Case History, Juror Knowledge, and Expert Testimony, in* 2 Handbook of Eyewitness Psychology: Memory for People 453, 484 (R.C.L. Lindsay et al. eds., 2007). Social scientists theorize that jurors do this, as the Innocence Project explains, because many of the scientific principles underlying the reliability of eyewitness testimony are counter-intuitive or do not comport with common sense. Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory,* 1 Psychol. Pub. Pol'y & L. 909, 921 (1995). Whatever the cause, the effect is that jurors frequently cannot accurately discriminate between correct and mistaken eyewitnesses and rely on the testimony of mistaken eyewitnesses. *Id.* at 925.

The jurors may also erroneously have relied on certainty as an indicator of accuracy.[12] "[M]ock-juror studies have found that confidence has a major influence on mock-jurors' assessments of witness credibility and verdicts." Neil Brewer & Gary L. Wells, *The Confidence–Accuracy Relationship in Eyewitness Identification: Effects of Lineup Instructions, Foil Similarity, and Target–Absent Base Rates,* 12 J. Experimental Psychol.: Applied 11, 11 (2006). Yet scientific research suggests that "eyewitness confidence is a poor postdictor of accuracy." Steven M. Smith et al., *Postdictors of Eyewitness Errors: Can False Identifications Be Diagnosed?,* 85 J. Applied Psychol. 542, 548 (2000). Because eyewitnesses sincerely believe their testimony and are often unaware of the factors that may have contaminated their memories, they are more likely to be certain about their testimony. *See United States v. Bartlett,* 567 F.3d 901, 906 (7th Cir.2009) (explaining that the "problem with eyewitness testimony is that witnesses who *think* they are identifying the wrongdoer —who are credible because they believe every word they utter on the stand—may be mistaken"). And because jurors confound certainty and accuracy, cross-examination is less likely to be effective in discrediting eyewitnesses. Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross–Examination,* 36 Stetson L.Rev. 727, 772 (2007); *Henderson,* 208 N.J. at 234–37, 27 A.3d 872; *see also People v. LeGrand,* 8 N.Y.3d 449, 458, 835 N.Y.S.2d 523, 867 N.E.2d 374 (2007) (noting that scientific research relating to correlation between confidence and accuracy, effect of post-event information on accuracy, and confidence malleability is "generally accepted ***89** by social scientists and psychologists working in the field"). This research only reinforces our independent determination that the improper admission of Mrs. Sykes's uncorroborated identification testimony at Young's trial had a substantial and injurious effect on the jury's verdict.

CONCLUSION

For the reasons just stated, the judgment of the district court granting the writ and ordering Young's convictions vacated is affirmed. Because Young is currently serving a term of 25 years to life on an unrelated charge, that judgment does not require his release. Although the State did not address (in any fashion) the district court's "extraordinary remedy of precluding the prosecution from retrying Young," *Young,* 761 F.Supp.2d at 83, we view the district court's imposition of that stricture as premature, *see DiSimone v. Phillips,* 518 F.3d 124, 126–28 (2d Cir.2008) (vacating order barring retrial because petitioner had not argued that retrial would be barred by "double jeopardy, or would necessarily involve constitutionally insufficient evidence"). If the State seeks to retry Young (without, of course, the eyewitness identification of Mrs. Sykes), Young is free to argue in state court that the re-prosecution is barred.

All Citations

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Footnotes

1 The parties consented below to disposition of the matter by a magistrate judge pursuant to 28 U.S.C. § 636(c)(1).

2 The Appellate Division, Fourth Department, determined that Young was arrested without probable cause. *See People v. Young,* 202 A.D.2d 1024, 609 N.Y.S.2d 725, 726–27 (1994).

3 At a hearing held eight years later, Mrs. Sykes stated that she also told the police the intruder's skin was light black.

4 At a hearing held five days after the photo array, Mrs. Sykes stated that she selected someone other than Young. However, at a hearing held eight years later, she asserted that she made no identification from the photo array.

5 The dissenting judge further chided the majority for "miss[ing] the opportunity to hold that ..., as a matter of law, where eyewitness identification is attenuated and possibly tainted, and corroborating evidence is weak, courts should allow expert testimony concerning eyewitness identification." *Id.* at 50, 817 N.Y.S.2d 576, 850 N.E.2d 623.

6 By contrast, in determining whether a witness's pre-trial identification has reliability independent of *unduly suggestive identification procedures,* courts examine the following factors: "[(1)] the opportunity of the witness to view the criminal at the time of the crime, [(2)] the witness' degree of attention, [(3)] the accuracy of the witness' prior description of the criminal, [(4)] the level of certainty demonstrated by the witness at the confrontation, and [(5)] the length of time between the crime and the confrontation." *Neil v. Biggers,* 409 U.S. 188, 199–200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

* * *

7 The Innocence Project is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It pioneered the post-conviction DNA model that has led to the exoneration of 289 innocent persons to date, the vast majority of whom were originally convicted based, at least in part, on the testimony of eyewitnesses who turned out to be mistaken.

8 In a footnote in its reply brief, the State argues that, "[b]ecause [Young] did not present any expert testimony at the independent source hearing on the reliability of identification procedures, he cannot rely upon any here." Resp.'s Reply Br. 8 n. 2 (citing *Cullen v. Pinholster,* —— U.S. ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011) (holding that habeas review "is limited to the record that was before the state court that adjudicated the claim on the merits")). Our conclusion that Mrs. Sykes's in-court identification lacked an independent source is reinforced, but not compelled or controlled by, the literature we discuss below.

9 *See also State v. Guilbert,* 306 Conn. 218, 234 & n. 8, 49 A.3d 705, 720 & n. 8 (2012) (collecting cases reflecting a general acceptance across circuits of scientific studies questioning the reliability of eyewitness identifications).

10 Three of the four courts of appeal to have considered the issue appear to agree. *See United States v. Ishmael,* 343 F.3d 741, 742–43 (5th Cir.2003) (exercising discretion to apply *Stone* as procedural bar rather than treating it as mandatory bar); *Tart v. Massachusetts,* 949 F.2d 490, 497 n. 6 (1st Cir.1991) (reaching merits of Fourth Amendment claim in habeas proceeding in part because Commonwealth had not asserted *Stone*); *Davis v. Blackburn,* 803 F.2d 1371, 1372–73 (5th Cir.1986) (per curiam) (divided panel) (holding that in appropriate cases "a federal court is not foreclosed from *sua sponte* applying the principles of *Stone* " noting that *Stone* is a "prudential" not a "jurisdictional" rule); *Wallace v. Duckworth,* 778 F.2d 1215, 1220 n. 1 (7th Cir.1985) (reasoning that because "respondents never raised any *Stone* [ ] argument, and since the rule of *Stone* [ ] is not a jurisdictional rule, we need not raise the issue *sua sponte.*" (citation omitted)); *but see Woolery v. Arave,* 8 F.3d 1325, 1328 (9th Cir.1993) ("read[ing] *Stone* as a categorical limitation on the applicability of fourth amendment exclusionary rules in habeas corpus proceedings").

11 *See, e.g., Day v. McDonough,* 547 U.S. 198, 209, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006) (holding that where state fails to raise AEDPA statute of limitations defense, "district courts are permitted, but not obliged, to consider, *sua sponte,* the timeliness of a state prisoner's habeas petition"); *Trest v. Cain,* 522 U.S. 87, 89, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997) (holding that "[a] court of appeals is not 'required' to raise the issue of procedural default *sua sponte* " given that "procedural default ... is not a jurisdictional matter"); *Granberry v. Greer,* 481 U.S. 129, 131, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (pre-AEDPA, holding that states' failure to raise exhaustion defenses permit courts of appeal "to exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits"); *Danforth v. Minnesota,* 552 U.S. 264, 289, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) (holding that state can waive *Teague* non-retroactivity argument by not asserting it in a timely manner); *Caspari v. Bohlen,* 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) (holding that consequences of waiver are that "a federal court may, but need not, decline to apply *Teague* if the State does not argue it") (citing *Schiro v. Farley,* 510 U.S. 222, 228–29, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994)); *Schiro,* 510 U.S. at 228, 114 S.Ct. 783 (explaining that "[t]he *Teague* bar to the retroactive application of new rules is not ... jurisdictional").

12 We note that, in concluding that Mrs. Sykes's in-court identification had an independent basis, the trial court itself expressly relied on the fact that Mrs. Sykes "seemed most certain of her ability to identify [Young]." App. at 195.

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